TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1166.

THE TOWN OF SANTA ANNA, PLAINTIFF IN ERROR,

vs.

AUGUSTUS FRANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 23, 1884.

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INDEX.

	Original.	Print.
Writ of error	1	1
Placita	3	1
Declaration and copy of instrumeats sued on	4	2
Summons	10	5
Demurrer to declaration	12	6
Rule to plead	13	6
Trial by the court	13	6
Judgment for plaintiff	14	7
Order overruling motion for new trial	15	7
Bill of exceptions	15	8
a.—Copy of bonds sued on	16	8
b.—Copy of coupons sued on	17	9
c.—Deposition of Levi Rathbun	18	9
d.— " Henry Funk	21	10
e.— " David Kelley	22	11
f.—Exhibit "A" to deposition of L. Rathbun	23	11
g.— " "B" " "	25	12
h.—Reasons of defendant on motion for new trial	30	15
Bond on writ of error	32	16
Clerk's certificate	34	17
Citation and acknowledgment of service	35	17

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois before you, between Augustus Frank, plaintiff, and The Town of Santa Anna (in the county of De Witt, Illinois), defendant, a manifest error hath happened, to the great damage of the said defendant, The Town of Santa Anna, as by its complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of Octo-
2 ber next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, in said south-southern district of Illinois, this 15th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth year.

[SEAL.] J. A. JONES,
Clerk Circuit Court of United States
for Southern District of Illinois.

[Endorsed:] C. C. No. 6767. Supreme Court of United States. Town of Santa Anna, plaintiff in error, *vs.* Augustus Frank. Writ of error. Filed October —, 1884. —— ——, clerk.

3 *Placita.*

Pleas in the circuit court of the United States of America, in and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit of the United States, *pro tempore* sole judge of said court, on Tuesday, the 29th day of April, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and eighth year.

J. A. JONES, *Clerk.*

AUGUSTUS FRANK
vs.
THE TOWN OF SANTA ANNA. } G. No. 6767. Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss*:

Augustus Frank, a citizen of the State of New York, plaintiff in this suit, puts in his place T. C. Mather, Esq., his attorney, against The Town of Santa Anna, a citizen of the State of Illinois,
4 and located in said district, the defendant, in a plea of trespass on the case upon promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss*:

Be it remembered that heretofore, to wit, on the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-three, came the said plaintiff, by his attorney, and filed in the office of the clerk of said court his declaration in said foregoing entitled cause, together with copy of instruments sued on, which declaration and copy of instruments are in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, *Southern District of Illinois*:

In Circuit Court. January Term, A. D. 1884.

Augustus Frank, a citizen of the State of New York, plaintiff, by T. C. Mather, his attorney, complains of The Town of Santa Anna, defendant, of a plea of trespass on the case upon promises, for that whereas the said defendant heretofore, to wit, on the first day of October, A. D. 1867, at, to wit, the district aforesaid, in pursuance of a law of the State of Illinois, entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and confer a charter upon
5 the same," approved February 28th, 1867, & in accordance with the vote of the electors of said township at the special election held July 21, 1866, in accordance with said act, made its certain thirty-four bonds in writing, signed by its mayor and clerk, Nos. 5 & 6, for $500 each, & Nos. 1 to 12 inclusive, 16, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, & 65, for $100 each, all of said bonds due & payable Oct. 1, 1877, and its certain thirty-four interest coupons thereto belonging & numbered to correspond with said bonds, signed also by said mayor and clerk, said numbers 5 & 6 for $50 each & said other numbers for $10 each, all of said coupons due & payable Oct. 1st, 1877; and then and there, to wit, at said district, on, to wit, Oct. 1st, 1867, delivered said bonds and coupons to said Danville, Urbana, Bloomington & Pekin Railroad Co., by which said defendant then and there promised to pay bearer, at the respective dates of maturity of said bonds and coupons, the respective amounts in said bonds and coupons mentioned as aforesaid. And plaintiff avers he purchased said bonds and coupons, at, to wit, New York city, on, to wit, the first day of May,

1877, for value before due, in the usual course of his business, and without notice of any defence thereto, and that he is now the owner and bearer thereof, and that they were all long past due before the commencement of this suit.

6 By reason whereof, and by force of the statute in such case mode and provided, the defendant became liable to pay plaintiff the said sums of money in said bonds and coupons specified, according to the tenor and effect of the said bonds and coupons; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and in the district aforesaid, undertook and then and there faithfully promised plaintiff well and truly to pay unto plaintiff the said sums of money in the said bonds and coupons specified, according to the tenor and effect of the said bonds and coupons.

And whereas, also, the defendant, on, to wit, the first day of December, 1883, at, to wit, said district, was and still is indebted to plaintiff in the sum of ten thousand dollars for money before that time paid, laid out, and expended by plaintiff for the use of defendant at its request, and in the sum of ten thousand dollars, for money before then lent and accommodated by plaintiff to defendant, at its request, and in the sum of ten thousand dollars for money before then had and received by defendant to use of plaintiff, and in the sum of ten thousand dollars before then due from defendant to plaintiff for interest on divers large sums of money before then due from defendant to plaintiff, and by plaintiff forborne to

7 defendant for long spaces of time before then elapsed, at the request of defendant.

And, being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the district aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sums of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc., to wit, on the day when the said bonds & coupons became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit, at the district aforesaid) has not yet paid the several sums of money above mentioned, nor any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiff of ten thousand dollars; and therefore the said plaintiff brings suit, etc.

By his Att'y, T. C. MATHER.

Copy of Bonds Sued on.

UNITED STATES OF AMERICA, *State of Illinois:*

No. 5. Township railroad bond. $500.

8 Know all men by these presents, that the township of Santa Anna, in the county of De Witt and State of Illinois, acknowl-

edges itself to owe and be indebted in the sum of five hundred dollars, lawful money of the United States of America, which sum of money the said township of Santa Anna promises to pay to the order of —— ——, at the office of the county treasurer of said county, on the first day of October, in the year one thousand eight hundred and seventy-seven, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of October in each year, at the office of the treasurer of said county, upon presentation and delivery of the warrants or coupons severally hereto annexed, until the payment of said principal sum. This bond is issued under and by virtue of a law of the State of Illinois entitled "An act to amend the articles of association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and confer a charter upon the same," approved February 28th, 1867, and in accordance with the vote of the electors of said township, at the special election held *held* July 21st, 1866, in accordance with said act; and the faith of the township of Santa Anna is hereby pledged for the payment of the said principal sum and interest as aforesaid.

9 In witness whereof, the supervisor and clerk of said township of Santa Anna have subscribed this bond this first day of October, one thousand eight hundred and sixty-seven.

L. RATHBURN, *Clerk.*

S. S. CAPEN, *Supervisor.*

The defendant is hereby notified that the remaining thirty-three bonds sued on, & to be offered in evidence at the trial hereof, are *fac-similes* of the foregoing copy, except the bond Nos. therein and the denomination thereof, Nos. 5 & 6 being for $500 each, and the remainder for $100 each.

T. C. MATHER,
Att'y for Pl'ff.

Copy of Coupons Sued on.

$50. Santa Anna township railroad bond. No. 5.

Interest warrant.

Treasurer of De Witt county pay to bearer, October 1st, 1877, fifty dollars at the county treasurer's office, De Witt county, Illinois, being the interest due on the bond numbered above.

L. RATHBURN, *Clerk.*

S. S. CAPEN, *Supervisor.*

Defendant is hereby notified that all the remaining coupons sued on in this case are *fac-similes* of the above copy, except as to numbers and dates of maturity and the denomination, Nos. 5 & 6 being for $50, & all the other numbers being for $10 each.

T. C. MATHER,
Pl'ff's Att'y.

10 *Copy of Ac. Sued on.*

Town of Santa Anna to Augustus Frank, Dr.

To money paid, laid out, & expended		$10,000
" " "	lent, & accommodated	10,000
" " "	had & rec'd	10,000
" " "	due for interest on, &c.	10,000

(Endorsed:) Filed December 18, 1883. J. A. Jones, clerk.

And thereupon, to wit, on the day last aforesaid, there was issued out of said clerk's office a summons in said cause, directed to the marshal of said district to execute, which summons, and the return of said marshal thereto, are in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Southern District of Illinois*, } ss:

The United States of America to the marshal of the southern district of Illinois, Greeting:

We command you to summon the town of Santa Anna, if found in your district, to be and appear before our judges of our circuit court of the United States, for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next,
11 to answer unto Augustus Frank of a plea of trespass on the case upon promises, to his damages, as he alleges, of ten thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield, aforesaid, this eighteenth day of December, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred*th* & eighth year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's Return.

I hereby appoint Minor B. Neal my deputy to execute the within process.

Dated this 21st day of December, 1883.

JOHN R. TANNER,
U. S. Marshal.

I have executed the within writ by delivering a copy of the same to Matthias Crum, supervisor of the town of Santa Anna, as therein commanded, this 22d day of December, 1883.

JOHN R. TANNER,
U. S. Marshal,
By MINOR B. NEAL, *Deputy.*

(Endorsed:) Filed January 7, A. D. 1884. J. A. Jones, clerk.

And afterwards, to wit, on the 2d day of January, in the year of our Lord one thousand eight hundred and eighty-four, came
12 the defendant, by its attorney, and filed in said clerk's office its demurrer to plaintiff's declaration, which demurrer is in the words and figures following, to wit:

Demurrer to Declaration.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

In the Circuit Court of the United States, Southern District. January Term, 1884. In Assumpsit.

AUGUSTUS FRANK *vs.* THE TOWN OF SANTA ANNA.

And the said defendant, by Thomas F. Tipton, its attorney, comes and defends the wrong and injury, when, &c., and says that the said declaration and each count thereof is not sufficient in law for the plaintiff to maintain his aforesaid action, and that the defendant is not bound to answer the same; wherefore for want of a sufficient declaration the defendant prays judgment, &c.

THOMAS F. TIPTON,
Att'y for Defendant.

(Endorsed:) Filed January 2, 1884. J. A. Jones, clerk.

And afterwards, to wit, on Monday, the 7th day of January, at the January term of said court, and in the year last aforesaid, the
13 following proceedings were had in said court in said cause and entered of record, to wit:

Rule on Defendant to Plead.

AUGUSTUS FRANK *vs.* TOWN OF SANTA ANNA. } 6767. Assumpsit.

On motion of plaintiff, by T. C. Mather, Esq., his attorney, the defendant having been regularly served with process, is ruled to plead herein by Wednesday, the 9th day of January, inst.

And afterwards, to wit, on Thursday, the 27th day of March, at the term of court, and in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Trial by Court.

AUGUSTUS FRANK *vs.* TOWN OF SANTA ANNA. } 6767. Assumpsit.

This day comes as well the plaintiff, by T. C. Mather, Esq., his attorney, as the defendant, by T. F. Tipton, Esq., its attorney, and

the issue joined, by consent, is tried by the court, a jury being waived by stipulation in writing; and the court having heard the evidence and argument of counsel takes the same under advisement.

14 And afterwards, to wit, on Tuesday, the 29th day of April, at the term of the court, and in the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Judgment for Plaintiff.

AUGUSTUS FRANK *vs.* TOWN OF SANTA ANNA. } 6767. Assumpsit.

This day come again the parties, by their attorneys, and the court being now sufficiently advised in the premises, finds the issue for the plaintiff and assesses his damages to the sum of eight thousand and fourteen dollars and eighty-six cents ($8,014.86.)

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of eight thousand and fourteen dollars and eighty-six cents, his damages aforesaid assessed by the court, together with the sum of forty-five dollars and thirty-seven cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

Defendant enters its motion for a new trial.

And afterwards, to wit, on Friday, the 8th day of August, at the June term of said court, in the year last aforesaid, (A. D.
15 1884,) the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order Overruling Motion for New Trial.

AUGUSTUS FRANK *vs.* TOWN OF SANTA ANNA. } 6767. Assumpsit.

And now, on this 8th day of August, 1884, come again the parties by their counsel, and submit to the court the defendant's motion for a new trial; and the court having heard and considered said motion, doth overrule the same.

And afterwards, on the 10th day of October, in the year last aforesaid, came the defendant, by its attorney, and presented its bill of exceptions in said cause, which was signed by the judge of said court and ordered to be filed; which said bill of exceptions is in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *Southern District of Illinois:*

Circuit Court U. S. Southern Dist. Illinois. June Term, 1884.

AUGUSTUS FRANK *vs.* THE TOWN OF SANTA ANNA.

Be it remembered that on the trial of this cause in this
16 term, the plaintiff gave in evidence on his behalf as follows:
Thirty-four bonds, each for the same sum and amount and of the same date, and each a copy of the other, except the number, one of which said bonds is in the words and figures following, to wit:

a.—Copy of Bonds Sued on.

UNITED STATES OF AMERICA, *State of Illinois:*

No. 65. Santa Anna Township Railroad Bonds. $100.

Know all men by these presents that the township of Santa Anna, in the county of DeWitt, and State of Illinois, acknowledges itself to owe and be indebted in the sum of one hundred dollars, lawful money of the United States of America, which sum of money the said township of Santa Anna promises to pay to the order of ——— ———, at the office of the county treasurer of said county, on the first day of October, in the year one thousand eight hundred and seventy-seven, with interest thereon at the rate of ten per centum per annum, which interest shall be payable yearly on the first day of October on each year, at the office of the treasurer of said county, upon presentation and delivery of the warrants or coupons severally hereto annexed until the payment of the said principal sum. This bond is issued under and by virtue of a law of the State of Illinois entitled
"An act to amend the articles of association of the Danville,
17 Urbana, Bloomington & Pekin Railroad Company, and to extend the powers of and confer a charter upon the same," approved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held July 21st, 1866, in accordance with said act; and the faith of the township of Santa Anna is hereby pledged for the payment of said principal sum and interest as aforesaid.

In witness whereof, the supervisor and clerk of said township of Santa Anna, have subscribed this bond, this first day of October, one thousand eight hundred and sixty-seven.

L. RATHBUN, *Clerk.*

S. S. CAPEN, *Supervisor.*

[Written across the face in red ink: 100.]

The plaintiff also gave in evidence thirty-four coupons attached to said bonds, which said coupons are each for the same amount and date, and each a copy of the other except the numbers; one of said coupons is in the words and figures following, to wit:

b.—Copy of Coupons Sued on.

$10. Santa Anna Township Railroad Bonds. No. 65.

Interest Warrant.

Treasurer of DeWitt county pay to bearer October 1st, 1877, ten dollars, being one year's interest on bond numbered as above.

L. RATHBUN, *Clerk.*

S. S. CAPEN, *Supervisor.*

[Written across the face in red ink: 10.]

To the introduction of said bonds and coupons in evidence the defendant, by its counsel, objected, but the court overruled
18 the objection and admitted the same evidence. To the ruling of the court the defendant, by its counsel, then and there excepted.

Here the plaintiff rested.

And thereupon the defendant gave in evidence as follows:

Testimony taken before George W. Herrick, as commissioner, &c., at Farmer City, Illinois, on behalf of defendant:

c.—Deposition of Levi Rathbun.

First Interrogatory: What is your name, age, and occupation, and place of business?

Answer. My name is Levi Rathbun; my age is seventy-two years; I have no special business or occupation; my place of residence is Farmer City, Ill's.

2nd Int. If you held any official position in said town of Santa Anna on the 21st day of July, A. D. 1866, please state what position; and, if you state that you was town clerk, state the fact and how long and what years you held that position?

Answer. I was town clerk of the town of Santa Anna, county of DeWitt, and State of Illinois, and held said office all the time from the year 1859 to the sixth day of April, 1875, so that on the 21st day of July, 1866, I was town clerk.

3d Int. If you ever held any other position—official I
19 mean—in said town, state what position, and for what years or times?

Answer. I held the office of supervisor of the town of Santa Anna, in De Witt Co., Ills., from the third day of April, 1877, to the sixth day of April, 1880.

4th Int. If a town meeting was held on or about the 21st day of July, 1866, state the fact, and state who acted as moderator, and who acted as clerk or clerks.

Answer. There was a town meeting held on the 21st day of July, 1866, in the town of Santa Anna, De Witt county, Ills., at which meeting E. L. Waller acted as moderator and acted as clerk; but I have examined the records of the town of Santa Anna, and there is no record of any notice ever having been given for the town

meeting of said town on July 21st, 1866, and I don't think any notice of said meeting was given.

5th Int. If you state that a town meeting was held on the 21st day of July, 1866, or any other day about that time, state whether or not you, as clerk of said town, made a record of it; and, if so, attach a copy of the record of the same to this your deposition, and make the same a part of this your deposition.

Answer. There was a town meeting held on the 21st day of July, 1866, in said Santa Anna township, at which town meeting I acted as town clerk, and at that time I made a record of the town meeting in the record-book of said town, a true copy of which is hereto attached and marked Exhibit "A," and made a part of my deposition.

6th Int. Was there ever any election held or other town meeting held in your town in relation to the issue of said bonds?

Answer. There was no other meeting or any election held in said town in relation to said bonds or the issue of the same.

7th Int. If any bonds, or what purported to be bonds, of the town were delivered, state to whom and the date.

Answer. What purported to be bonds of said town of Santa Anna were delivered to C. R. Griggs, then president of the Danville, *Urbana* Urbana & Pekin Railway Co., as follows: On the 29th day of May, 1868, there were delivered to said C. R. Griggs three thousand dollars of the face value of said bonds; also, on the 6th day of October, 1868, there was delivered by the supervisor of said town to said C. R. Griggs twenty-five thousand dollars of the face value of said bonds; and on the 13th day of Nov., 1868, there was delivered by the supervisor of said town to said C. R. Griggs of said bonds twenty-two thousand dollars of the face value of said bonds.

8th Int. Examine the lists of voters now shown you, and state whether or not the names contained in said lists were residents and voters in said township on the 21st day of July, 1866; give your best recollection and means of knowledge, and make said list an exhibit to this your deposition and a part of the same.

Answer. (The list of voters of said town were here shown witness, who states as follows:) The names contained in said list which I now hold were residents and voters in said Santa Anna T'w'p on the 21st day of July, 1866. I am personally acquainted with every man whose name appears on this list, and was at said town meeting on the 21st day of July, 1866, town clerk; and I hereby make this list of voter sin Santa Anna T'w'p on the 21st day of July, 1866, a part of this my deposition, and make the same Exhibit "B."

L. RATHBUN.

d. Deposition of Henry Funk.

Interrogatories propounded to HENRY FUNK, a witness produced and sworn as aforesaid on the part of the defendant, and the answers thereto:

First interrogatory. What is your name, age, and occupation and place of residence?

Answer. My name is Henry Funk; my age is forty-nine years; my occupation, machinist; reside at Farmer City, Ills.

2d Int. Were you residing in Santa Anna township on the 21st day of July, 1866?

Answer. Yes, sir.

22 3d Int. Examine the list of names now shown you, and state whether or not the same contains a correct list of voters residing in said town on the 21st day of July, 1866; give your best recollection, and whether you were well acquainted in said town.

Answer. (The list of voters marked Exhibit "B" in Levi Rathbun's deposition were here shown witness, who testified as follows:) The list of voters now shown me is a correct list of voters residing in Santa Anna T'w'p, De Witt Co., Ills., on the 21st day of July, 1866; I, at that time, was acquainted with every voter residing in said town. I moved to Santa Anna T'w'p in 1855.

HENRY FUNK.

e. Deposition of David Kelly.

Interrogatories propounded to DAVID KELLY, a witness produced and sworn on the part of the defendant, and the answers thereto:

First interrogatory. What is your name, age, and occupation and place of residence?

Answer. My name is David Kelly; my age, fifty-two years; occupation, smith, and I now reside at Weidman, in McLean Co., Ills.

2d Int. Were you residing in Santa Anna township on the 21st day of July, 1866?

Answer. Yes, sir.

23 3d Int. Examine the list of names now shown you, and state whether or not the same contains a correct list of voters residing in said town on the 21st day of July, 1866; give your best recollection, and whether you were well acquainted in said town.

Answer. (The list of voters were here shown the witness, when witness answered as follows, to wit:) The list of voters now shown me is a correct list of voters of Santa Anna t'w'p on the 21st day of July, 1866, and the same residing in said town at that time, and at that time I was acquainted with every voter in Santa Anna t'w'p.

DAVID KELLEY.

f. Exhibit "A" to Deposition of Levi Rathbun.

EXHIBIT "A."

A copy of a special town meeting held in the township of Santa Anna, De Witt county and State of Illinois, on *July* 21st day of July, A. D. 1866.

At a special town meeting held in the town of Santa Anna, De Witt county and State of Illinois, at the school house in Mount Pleasant, on the 21st day of July, A. D. 1866. The meeting was called to order by L. Rathbun, town clerk; E. L. Waller, on motion

Wm. U. McCord, was duly chosen to preside as moderator, who, being first duly sworn by L. Rathbun, town clerk, entered upon the duty of his office; the polls being opened for the purpose of voting for [or] against the town taking fifty thousand dollars' worth of stock in a contemplated R. R. *road* from Danville, Illinois, by the way of Urbana, Champaign, Middleton, Mount Pleasant, Leroy, and Bloomington, and to some point on the Illinois river, proclamation thereof being first made by the town clerk. At 12 o'clock, at noon, on motion, the meeting adjourned for one hour, until one o'clock p. m. At one o'clock p. m. the meeting was called to order by the moderator, and the polls were opened pursuant to adjournment. At six o'clock p. m. the polls were announced closed, proclamation thereof having been made by the clerk. The following is a statement of the result of the canvas- of votes by ballot for and against the township taking stock in said contemplated railroad to the amount of fifty thousand dollars, provided said company makes Mount Pleasant a point in the location of said road in the town of Santa Anna, De Witt county and State of Illinois, as publicly canvassed by the presiding officer of said special town meeting held in the village of Mount Pleasant, in the town of Santa Anna, July 21st, A. D. 1866, as follows, to wit:

There was one hundred and three votes cast for taking fifty thousand dollars stock in said contemplated railroad on the conditions before expressed, and eight votes cast against the town taking said amount of stock in said contemplated R. R. *road*, the result of the meeting being publicly announced by the clerk, when the meeting adjourned without day.

E. L. WALLER, *Moderator.*

Attest: L. RATHBUN, *Clerk.*

g. EXHIBIT "B" to Deposition of LEVI RATHBUN.

	Names of Electors.		Names of Electors.
1	Arler, George	19	Brownlee, Horace
2	Arbogast, D. H.	20	Burrington, L. T.
3	Arbogast, Henry	21	Cumming, R. V.
4	Armour, George	22	Cumming, A. M.
5	Anderson, W. H.	23	Capen, S. S.
6	Ames, Henry, Sr.	24	Campbell, Patton
7	Ames, H. H., Jr.	25	Crawford, R. O.
8	Buker, J.	26	Campbell, John W.
9	Brown, Jno.	27	Clark, Jas. W.
10	Brown, William	28	Corey, Stephen H.
11	Bissell, A. S.	29	Clearwater, Nathan
12	Burford, C. S.	30	Carew, Wm
13	Burford, J. M.	31	Clark, Lake
14	Brooks, A. R.	32	Clearwater, Allen
15	Baker, P. W.	33	Crowdell, Jas.
16	Brennan, James	34	Campbell, Jas.
17	Bean, F. M.	35	Chambers, Isaac
18	Brennan, Pat.	36	Doran, Peter

Names of Electors.

37 Danner, Isaac
38 Davis, Wm.
39 Doyle, Jno.
40 Doyle, Jeff.
41 Dodson, Albert
42 Dugan, J. C.
43 Durbin, D. M.
44 Drybread, Wm. L.
45 Doyle, Hugh
46 Davis, J. W.
47 Dunning, Jas. C.
48 Davidson, A. F.
26 49 Ennis, Lem. H.
50 Erwin, Jos.
51 Foster, Jos.
52 Funk, Henry
53 Farrner, Henry
54 Farmer, David
55 Farmer, George
56 French, Chas. F.
57 Fellows, Jno.
58 Gardiner, Thos.
59 Grable, Joseph
60 Gardiner, A. J.
61 Griffith, Jno.
62 Hurley, Dennis
63 Holloway, P. M.
64 Hurley, Jno.
65 Hirst, James
66 Hoover, Michael
67 Hand, Phillip
68 Hand, Jno. M.
69 Holloway, J. D.
70 Hopkins, Chas.
71 Holloway, Jno.
72 Hurley, Jerry
73 Hawkins, R. N.
74 Hays, Rob't
75 Hays, Wm.
76 Houser, J. C.
77 Huddleston, C. H.
78 Hurley, David
79 Hoover, A. T.
80 Hanger, Sam'l
81 Hazel, J. B.
82 Heater, George
83 Judd, Ezekiel
84 Jackson, Joseph
85 Jones, Campbell
86 Jones, Jno.

Names of Electors.

87 Johnson, Samuel
88 Jones, S. D.
89 Jones, Preston
90 Jones, Albert
91 Johnson, Kenith
92 Johnson, Wm.
93 Johnson, Elias
94 Kirby, Richard
95 Kirby, Jno. W.
96 Knight, R. R.
97 Kirby, Wm.
98 Kelley, David
99 Knight, Arrod
100 Krepps, A. T.
101 Lewis, Henry
102 Lowry, David
103 Lytten, Jesse
104 Longberry, Elias
105 Lincoln, P. A.
106 Lyon, W. W.
107 McCoy, Alexander
108 McMurray, J. D.
109 Merrifield, Athey
110 McPheters, Zach.
27 111 McKinly, Joseph
112 Murphy, W. W.
113 McKinly, J. H.
114 Martin, L. H.
115 McCord, Wm. Y.
116 McDonald, Thos.
117 McLean, T. A.
118 McDonald, Jno.
119 McCord, J. H.
120 Meliza, Adam
121 Meliza, Andrew
122 Moore, W. A.
123 McClurg, Thos.
124 McMurry, W. C.
125 Moore, William
126 Minnich, Austin
127 Maxwell, Wm.
128 McPherson, A. C.
129 Morgan, Stephen
130 Murphy, Hiram
131 Murphy, Thos. E.
132 Morley, Wm. R.
133 Malone, D. M.
134 Morris, Jno.
135 Mitchell, Henry
136 McPheters, Samuel

Names of Electors.

137 Morton, Ed. B.
138 Neal, Amos
139 Neal, Joseph
140 Nydegger, Theopolis
141 Newberry, Wm.
142 Newberry, Benjamin
143 Norris, A. S.
144 Neal, Thos.
145 Neal, J. W.
146 O'Brien, Thomas
147 Owen, George
148 Owen, Wm.
149 Plotner, Wm.
150 Page, Wm.
151 Page, Jno. A.
152 Pritchard, Elliott
153 Page, Geo. H.
154 Page, Justin S.
155 Powell, Jas.
156 Poff, Henry
157 Patterson, Jno.
158 Page, Alfred
159 Patterson, Sam'l
160 Page, Edward
161 Purcell, Michael
162 Robbins, F. R.
163 Richter, J. A.
164 Ross, Jas.
165 Rathburn, L.
166 Robbins, Jno.
167 Robbins, F. S.
168 Riggs, Randolph
169 Renies, Felix
170 Rosencrans, Jno.
171 Roberts, Wm.
172 Reagan, Chris.
28 173 Richards, R. T.
174 Rathbun, W. C.
175 Roberts, Antrim
176 Riggs, A. T.
177 Scott, Thos.
178 Scott, Willis
179 Stuckey, Van
180 Scott, Arthur
181 Stimler, Wm.
182 Swigart, Geo. W.
183 Smith, John
184 Smith, Henry
185 Shaffer, Paul
186 Shaffer, Joseph

Names of Electors.

187 Slick, Thomas
188 Shumaker, Hardy
189 Thomas, T. J.
190 Thomas, G. J.
191 Thomas, Isaac
192 Thew, Jesse J.
193 Tuthill, Jno. W.
194 Taylor, W. H.
195 Vannote, Wm. P.
196 Vannote, Ben. M.
197 Vannote, R. T.
198 Vannote, Morris
199 Vannote, A. T.
200 Vannote, Isaac J.
201 Vannote, Daniel
202 Waller, E. L.
203 Weidman, T. S.
204 White, David.
205 Walton, Peter.
206 Williams, Jno. H.
207 Watson, C. C.
208 Webb, Jno.
209 Wheeler, L. P.
210 Weidman, Asa
211 Wetzel, Geo.
212 Wetzel, Jefferson
213 Wetzel, Michael
214 White, Jacob L.
215 Weger, Wm. M.
216 Webb, R. D.
217 Williams, Chas.
218 Welch, Nathan
219 Welch, Platt
220 Welch, A. B.
221 White, James
222 Watson, S. E.
223 Watson, Chas. H.
224 Wilson, Thos. L.
225 Watson, Jas. Y.
226 Watson, Jno.
227 Woodward, J. W.
228 Weidman, Geo.
229 Wilson, A.
230 Weidman, Amos
231 West, Wm.
232 Whitaker, W.
233 Watson, Harry
234 Weedman, G. T.
29 235 Weidman, Philip
236 Wilson, E. H.

	Names of Electors.		Names of Electors.
237	Wilson, John S.	244	White, W. F.
238	Webb, R. H.	245	Wiser, Chas.
239	Webb, Preston	246	Wiggins, Resder
240	Webb, Henry	247	Welch, Chas. M.
241	Woodward, Edwards	248	Williamson, J. W.
242	Wolfe, J. B.	249	Weaver, Orrin S.
243	Woodward, W. B.	250	Yeats, A. M.

Thereupon the defendant rested.

This was all the evidence offered by either party, and thereupon the court found the issues for the plaintiff.

Whereupon the defendant, by its counsel, moved the court to set aside its findings and judgment, and to grant to the defendant a new trial of this cause, and filed the following reasons for his motion, to wit:

30 *h. Reasons on Motion for New Trial.*

UNITED STATES OF AMERICA:

In Circuit Court of the United States, Southern District of Illinois.

AUGUSTUS FRANKS } *vs.* } In Assumpsit.
TOWN OF SANTA ——. }

And now at this day comes the defendant, by its attorney, and moves the court to set aside its findings and judgment and for a new trial in said cause for the following reasons, to wit:

1. The findings and judgment is against the evidence.
2. The judgment is against the law.
3. The judgment is not supported by the evidence.
4. The court erred in holding that the defendant is liable on the bonds and coupons sued on.

4. The court erred in holding that that defendant is liable on the bonds and coupons sued on.

5. The court erred in holding that the town of Santa Anna can be held liable on the bonds and coupons in suit, the evidence clearly showing that no election was held or had been held authorizing the issue of said bonds and coupons.

6. The court erred in not holding that it was incumbent on the plaintiff to prove that he was a holder of the bonds &
31 coupons in good faith and for value.

7. The court erred in not holding that the plaintiff was bound to take notice of the want of power to issue the bonds and coupons.

8. The court erred in holding that so-called curative act was applicable and that the same was valid.

For these and other reasons to be pointed out on the hearing of this motion the defendant moves the court to grant to defendant a new trial.

Respectfully submitted.

THOMAS F. TIPTON,
Att'y for Defendant.

(Endorsed:) Filed May 2, 1884. J. A. Jones, clerk.

But the court denied the motion and gave judgment against the defendant; to which decision of the court in denying such motion the defendant then and there, by its counsel, excepted. Forasmuch as the matters above set forth do not fully appear of record, the defendant, by its counsel, tenders this its bill of exceptions, and prays that the same may be signed and sealed by the presiding judge of this court, pursuant to the statute and practice of this court, which is done accordingly this 9th day of October, 1884.

S. H. TREAT, *Judge*. [SEAL.]

(Endorsed:) Filed October 10, A. D. 1884. J. A. Jones, clerk.

32 And afterwards, to wit, on the 15th day of October, in the year last aforesaid, came the said defendant, by its attorney, and filed in said clerk's office its bond on writ of error in said cause, which bond was approved by the judge of said court, and is in the words and figures following, to wit:

Bond on Writ of Error.

In the Circuit Court of the United States for the Southern District of Illinois.

AUGUSTUS FRANK
vs.
TOWN OF SANTA ANNA. } Assumpsit.

Know all men by these presents, that we, the town of Santa Anna (in the State of Illinois), as principal, and Matthias Crum and John Weedman, of the county of De Witt and State of Illinois, as sureties, are held and firmly bound unto Augustus Frank in the sum of ten thousand dollars ($10,000), lawful money of the United States of America, to be paid to the said Augustus Frank, his heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 11th day of October, A. D. 1884.

Whereas, the above-named town of Santa Anna hath prosecuted a writ of error to the Supreme Court of the United States to
33 reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named town of Santa Anna shall prosecute its said writ of error to effect, and shall answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MATTHIAS CRUM. [SEAL.]
JOHN WEEDMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
W. S. YOUNG.

STATE OF ILLINOIS, } ss:
De Witt County, }

I, Walter S. Young, a notary public in and for the said county, in the State aforesaid, do hereby certify that Matthias Crum and John Weedman, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal, this 11th day of October, A. D. 1884.

[L. S.] WALTER S. YOUNG,
Notary Public.

Approved Oct. 15th, 1884.

S. H. TREAT,
Dist. Judge.

(Endorsed:) Filed October 15th, A. D. 1884. J. A. Jones, clerk.

34 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In circuit court for said district.

I, John A. Jones, clerk of the circuit court of the United States within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and the proceedings thereon had in a certain cause lately pending in said court, wherein Augustus Frank is plaintiff and The Town of Santa Anna (in county of De Witt, Illinois) is defendant, as fully as the same appear from the records and files of my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 14th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth.

[SEAL.] J. A. JONES, *Clerk.*

35 *Citation.*

Supreme Court of the United States.

The United States of America to Augustus Frank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois, wherein The Town of Santa Anna is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of

error mentioned should not be corrected and full and speedy justice done to the parties aforesaid in that behalf.

Witness the Hon. S. H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this — day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the one hundred and ninth year.

S. H. TREAT,
District Judge of United States for Southern District of Illinois.

I hereby acknowledge service of the above citation, this 14 day of Oct., 1884.

J. C. MATHER,
Att'y for Def. in Error.

[Endorsed:] Supreme Court of United States. The Town of Santa Anna, plaintiff in error, *vs.* Augustus Frank. Citation.

Endorsed on cover: S. Illinois C. C. U. S. No. 1166. The Town of Santa Anna, plaintiff in error, *vs.* Augustus Frank. Filed 23d October, 1884.

No. ..... Agenda No. .....

UNITED STATES OF AMERICA.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1884

Error to the Circuit Court of the United States for the Southern District of Illinois.

Brief and Argument

FOR PLAINTIFF IN ERROR.

TOWN OF SANTA ANNA,
Plaintiff in Error,
vs.
AUGUSTUS M. FRANKS,
Defendant in Error.

Filed this ..... *day*
of ..... *A. D. 188* .....

.....
Clerk.

HAMILTON SPENCER,
Attorney for Plaintiff in Error.

THOMAS F. TIPTON,
Of Counsel.

F. M. Doxsee, Printer, Bloomington, Ill

UNITED STATES OF AMERICA,

Supreme Court of the United States

OCTOBER TERM, A. D. 1884.

TOWN OF SANTA ANNA,
Plaintiff in Error,
vs.
AUGUSTUS M. FRANKS,
Defendant in Error.

Error to the Circuit Court of the United States for Southern District of Illinois.

May it Please the Court:

This was an action of assumpsit brought by the defendant in error, against the town of Santa Anna, plaintiff in error, on thirty-four bonds purporting to have been issued by plaintiff in error, thirty-two for the sum of one hundred dollars each, and two for $500 each, and coupons attached thereto, each for the sum of ten dollars on the thirty-two bonds, and for two for fifty dollars each, attached to the $500 bonds. The bonds matured on the first day of October, 1877; the coupons being each for one years' interest on the bonds.

It is claimed that the bonds were issued to the Danville, Urbana, Bloomington & Pekin Railroad Company.

The bonds were issued in blank as to the payee, and not made payable to bearer. The bonds show on their face that they were issued in pursuance of an election held July 21st, 1866. The plaintiff in error, the town of Santa Anna, is a municipal corporation under the statutes of the State of Illinois, with certain well defined but limited powers.

No election was ever in fact held, in the township authorizing the issue of these bonds, nor in fact any bonds. At the time it is stated in the bonds that an election was held, there was no authority of law authorizing the town to call or hold an election, for the purpose of issuing bonds of the town to the Danville, Urbana, Bloomington and Pekin Railroad Company, or any other railroad company. At the time stated in the bonds that the election was held, the Danville, Urbana, Bloomington and Pekin Railroad Company had not been incorporated and the act by which this railroad company was finally incorporated, did not become a law until Feb. 28th, 1867.

The bonds in suit in this case were issued in blank and were pretended to be issued by the town clerk and supervisor of the township, (plaintiff in error), in pursuance of the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, by virtue of an election held long prior to the date of the charter of the railroad company. No election was ever in fact held, authorizing their issue. The proof in this record is complete on this point; nor was there ever any notice given that an election would be held for any such purpose, nor was there ever any kind of a vote taken by which a majority of the legal voters of the town voted in favor of a subscription to said railroad company. A pretended town meeting was held in said town by some of the citizens of the town, on the 21st day of July 1866, by which it was voted by a majority of the persons attending and voting at said meeting, but a minority of the legal voters of the town, voted in favor of a subscription to the capital stock of said company. But there was not a majority of the legal voters of said town at said meeting, nor did a majority vote upon said question in fact; practically only such persons attended or voted at said meeting as were favorable to the scheme. There were only———persons at said meeting and voted upon this question, when there were residing in the town 250 legal voters. The meeting was in fact, a general railroad meeting of citizens, and it was not understood at the time that the meeting could or would in any manner make the town responsible for its action. It was not advertised as an election, nor was any notice given by the authorities of the town, or any of its officers that an elec-

tion would be held. The fact is, that the proceeding was simply a meeting of citizens who were desirous of having constructed a railroad with a hope in some manner of making money out of its construction, and the town was not any more legally bound by its action, than it would have been by the action of a church conference. Even if it be conceded, but which in fact we absolutely deny, that the meeting held was a town meeting, in the sense of the statute of the State of Illinois, such town meeting cannot be regarded as an election for the reason that the distinction between a town meeting and an election is well and thoroughly understood by the masses of the people, that we feel confident that the legislature understood when they enacted the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, into law the distinction between a town meeting and an election. A town meeting has thrown around it practically, no guards against fraud or imposition, and can be carried on apparently by any number of citizens, while elections are so thoroughly guarded as to secure a fair and impartial determination of any question submitted to a vote of the electors. Even if notice that a town meeting would be held had been given, or even if due and proper notice had been given that an election would be held, and even if an election had been held, with all the requirements of the statute complied with, the electors were not bound to attend or to vote for the reason that the action was unlawful. Illegal voters could not have been punished, nor was there any means for the punishment of fraud or perjury in connection with any such election. The proceeding would simply have been an unlawful act. This is perhaps, the reason that the curative clause in the charter was only made to apply to cases where a majority of the legal voters voted at such election. But no election was held and it will not be contended by counsel for defendant in error, that any election was held, nor will it be contended that a majority of the legal voters of the town voted at the meeting that was held, nor will it be contended that any notice was given that a vote would be taken on any proposition for the town to subscribe for stock of this contemplated railroad company, or to issue obligations in payment for such subscription.

The supervisor and town clerk, had no more authority under the law to issue the bonds in question, than the town assessor and town collector, or the moderator of a town meeting or the sheriff of the county. The act incorporating the Danville, Urbana, Bloomington and Pekin Railroad Co, is a private act, and all proceedings under it must be in conformity to its provisions. It is upon this act alone that counsel for defendant in error will rely as authority to give validity to the bonds in suit.

The bonds in suit were issued or purport to have been issued on the first day of October, 1867, and payable ten years after date with interest at the rate of ten per cent. per annum. Ten coupons were issued and attached to each of the bonds respectively.

The bonds in suit are part of pretended issue of $50,000.00 of bonds, purporting to be the bonds of the town and issued in payment of a pretended subscription made by the superviors of the town for $50,000.00, of the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, and were delivered to the President of the railroad company as follows:

This writ of error questions the validity of the bonds as binding obligations of the town, on the following grounds:

1. The bonds were issued in blank and are not payable to bearer.

2. That the bonds show on their face that they were issued without authority of law, in this, that the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company did not become a law until February 28th, 1867, and the bonds show that they were issued in pursuance of an election held July 21st, 1866, a time prior to the enactment of the charter of the railroad company, under the provisions of which it is claimed they were issued.

3. That no notice was ever given of an election for the submission of the question as to the issue of said bonds to a vote of the electors of the town.

4. That no notice was ever given nor was any election

ever held by the electors of the town upon the question of the issue of said bonds.

5. That there never was an election held by the electors of said town, at which election a majority of the legally qualified electors of said town, voted in favor of a subscription to the capital stock of said Railroad Company. That the curative clause, so-called, contained in the charter of the Danville Urbana, Bloomington and Pekin Railroad Company is unconstitutional and void.

6. That under the facts in this, that the bonds in suit are void and that the curative clause, so-called, and contained in the charter of said company, has no application for the reason that no election was ever held, by which a majority of the legal voters of said town were in favor of a subscription to the capital stock of said railroad company.

7. That under the facts contained in this record, the bonds in suit are void, and the curative clause, so called, contained in the charter of the said railroad, has no application for the reason that no election was ever held by the electors of said town, by which it was voted by a majority of the electors of the town to make a subscription to the capital stock of said railroad company, or to issue the bonds of the town in payment of the same.

8. That no authority was ever given by the electors of the town authorizing the supervisor and town clerk to issue the bonds in suit.

9. That there is no authority of law by which the supervisor and town clerk of the town can issue the bonds of the town, and bind the electors without a vote of the electors of the town.

10. That the provision contained in the bonds, that they were issued in pursuance of an election held on the 21st day of July, 1866, is not binding on the electors of the town for the want of power.

11. That the bonds are void for the want of power in the supervisor and town clerk to issue them; that it is not a ques-

tion of irregularity in holding an election, but a total want of power to make the issue.

12. That the bonds having been issued by the supervisor and town clerk without the sanction of a previous vote of the electors they were utterly powerless to bind the town by the issue of the bonds.

The charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, will be found in Vol. 2, Private Laws of the State of Illinois, 1867, p. 758 to 765, Sections 12, 13, 14, 15, 16 and 17, contain all of the provisions of the charter that are in any manner material to the question involved in this case and are as follows:

"SEC. 12. To further aid in the construction of said road, by said company, any incorporated town or townships in counties acting under township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum not exceeding two hundred and fifty thousand dollars."

"SEC. 13. No such subscription shall be made until the question hes been submitted to the legal voters of such incorporation, town or township, in which the subscription is proposed to be made; and the clerk of each of said towns, or townships, is hereby required, upon the presentation of a petition signed by at least ten citizens, who are legal voters and tax payers of such town or townships for which he is clerk, and in which petition the amount proposed to be subscribed shall be stated, to post up notices in at least three public places in each town or township; which notice shall be posted not less than thirty days before the day of holding such election, notifying the legal voters of said town or township to meet at the usual place of holding elections, in such town or township, or some other convenient place named in such notice, for the purpose of voting for or against such subscription: *Provided*, that where elections may have already been held and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case, no other election need be had: and the amount so voted for shall

be subscribed as in this act provided. And such elections are hereby declared to be legal and valid, as though this act had been in force at the time thereof, and all the provision hereof had been complied with."

"SEC. 14. If it shall appear that a majority of all the legal voters of such towns or townships voting at such election have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other chief executive officer, if in incorporated towns, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such town or township, the amount so voted to be subscribed, and to receive from said company the proper certificates therefor. He shall also execute to said company, in the name of said town or townships, bonds bearing interest at ten per cent. per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which bonds shall be signed by such president, executive officer or supervisor, and be attested by the clerk of the town or township in whose name the bonds are issued; and it shall be his duty to make a record of the issuing of said bonds. Said bonds shall be delivered to the president or secretary of said company for the use of said company; and when any city or county shall hereafter vote to make subscription as aforesaid, the chairman of the board of supervisors of such county and the mayor of such city, shall be required to subscribe to the capital stock of said company the amount so voted."

"SEC. 15. It shall be the duty of the clerk of any such town or township, in which a vote shall be given in favor of subscription, within ten days thereafter, to transmit to the county clerk of their respective counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid: *Provided*, that where elections may have been held, as aforesaid, it shall be the duty of the town clerks to file with the county clerks of their respective counties, within ten days after issuing of said bonds, certificates of the votes of their towns, the amount of stock

voted to be subscribed, the amount of bonds issued, and the rate of interest payable thereon."

"Sec. 16. It shall be the duty of the county clerk of such county, annually, after the execution and delivery of such bonds as aforesaid, to compute and assess upon all taxable property returned by the assessor of such town or township, a sum sufficient to pay the interest and costs of collection, and disbursements upon all bonds so issued by the respective towns or townships, which tax shall be extended upon the collector's books as other taxes are, and collected in the same manner that other taxes are collected, and, when collected, shall be paid to the treasurer of the county; and such town or township may, when providing for the levying and collecting of other taxes, also assess upon the property of such town or township any rate, not exceeding three per cent. in any one year, upon the assessment, to provide a fund for the redemption of the principal of such bonds as, or, when they become due, said tax to be levied and collected as other taxes are, and paid to the county treasurer; but no tax shall be computed, assessed, or collected, or any interest paid, to be applied upon such bonds, unless such bonds have been executed and delivered.

"Sec. 17.. It shall be the duty of the county treasurer to pay out, on the presentation to him of the bonds issued by any such towns or townships aforesaid, the amount due upon such bonds for interest, and also for principal, where any tax shall be assessed and collected to pay principal, out of any money in his hands for that purpose, and endorse such payment of interest or partial principal upon the bonds; and when such bonds shall be redeemed or paid, he shall receive and cancel the same, and return the same to the said president or supervisor, who shall destroy the same, in the presence of the clerk of such town or township, who shall make a record of the transaction.

"The town collector and county treasurer, in towns or counties which subscribe to said capital stock, shall receive the same percentage for receiving and disbursing said fund as they now receive in collecting and disbursing the school fund."

The only provision of law for the issue of the bonds in suit

is the sections of the charter above cited. The meeting was held July 21st, 1866, and the charter became a law February 28th, 1867. It is well settled that before a township, under the laws of Illinois, can make a subscription or issue it bonds in payment therefor, *there must be an express grant of power.*

Town of East Oakland vs. Skinner, 94 U. S., 256.

People vs. Town of Waynesville, 88 Ill., 475.

J. N. W. & R. R. Co. vs. Town of Virden, 104 Ill., 341.

In the last case cited, the Court say: "A charter is held to be a contract between the State and the corporation, and no clause or power or privilege can be inserted by implication."

Charles River Bridge vs. Warren, 11 Pet., 420.

Bank vs. Commonwealth, 10 Pet., 422.

Bradley vs. Railroad Co., 21 Conn., 294.

Bank of Chillicothe vs. Swayne, 8 Ohio, 287.

Trustees of Jacksonville vs. McConnell, 12 Ill., 138.

Bissil vs. Kankakee, 83 Ill., 251.

Pitzman vs. Freeburg, 92 Ill., 113.

The authority of a majority of the tax-payers of a town to incumber the minority against their will, in aid of a railroad or other corporation, receives no countenance from the common law. Every step, therefore, required by the statute authorizing such aid, must be in strict conformity therewith.

Cowdrey vs. Caneadea, 16 Federal Rep., 532.

It is also true that from a bare power given to a municipal corporation to subscribe to the capital stock of a railroad, there is not to be implied a power to pay the subscription in bonds.

Green vs. Dyersburgh, 2 Flip, G. Ct., 477.

And keeping in mind the fact that a municipal corporation has no power, in the absence of power conferred by the legislature, either expressly or by necessary implication, to issue, in aid of a railroad, negotiable bonds payable to bearer.

See Katzenberg vs. Aberdeen, 16 Fed. Rep., 475.

It has been uniformly held by this Court, that unless the specific power was granted to make the subscription and issue the bonds, that such subscriptions and the bonds issued in payment for such subscription were absolutely void, *even as* against *bona fide* holders.

Thompson vs. Lee County, 3 Wall, 327.

Marsh vs. Fulton County, 10 Wall, 676.

McClure vs. The Township of Oxford, 94 U. S., 429.

Wells vs. Supervisors, 102 U. S., 625.

Allen vs. Louisiana.

Ottawa vs. Carey, 108 U. S., 123.

Municipal corporations are created by the State only and for the sole purpose of aiding the State Government in the legislation and administration of the local affairs, and such municipalities possess only such powers as are expressly granted, or such as may be implied because essential to carry into effect those which are expressly granted.

Ottawa vs. Carey, 108 U. S., 110.

It is held in the case of Welch et al. vs. Post, 99 Ill., 471, that making donations to railway companies, and issuing interest-bearing bonds in payment thereof, are not among the implied powers possessed by municipal corporations, and without express power given by statute to issue such bonds, they be void in the hands of any and all persons.

See also C., B. & Q. R. R. Co. vs. City of Aurora, 94 Ill., 205.

It has been uniformly held in this State, and followed by the Supreme Court of the United States in the case of the Town of Elmwood vs. Marcy, 92 U. S., 289, that under the Constitution of Illinois (1848) the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes.

Hesler vs. Drainage Commissioners, 53 Ill., 110.

Livingston vs. Wider, 53 Ill., 302.

Marshall et al. vs. Silliman et al., 61 Ill., 218.

Harwood vs. St. Clair & Monroe Levee Drainage Co., 51 Ill., 130.

Wiley et al. vs. Silliman et al., 62 Ill., 170.

Cairo & St. Louis R. R. Co. vs. City of Sparta, 77 Ill., 505.

Middleport vs. Ætna Life Ins. Co., 82 Ill., 552.

Barnes vs. The Town of Lacon, 84 Ill., 461.

The People, ex rel., vs. Mayor of Chicago, 51 Ill., 30.

No class of persons but the electors of the town and the officers chosen by them, can determine the action of the town on the question of issuing the bonds of the town in aid of a railroad company.

Harrington vs. Plainview, 27 Minn., 224.

It is the settled rule in Illinois, and engrafted on our present constitution, that the legislature cannot compel a municipal corporation to incur a debt, or issue its bonds for a local corporate purpose, without its consent. Under the constitution of 1848 it might be invested with power to that end by the legislature, and incur such a debt through its corporate authority to do so. Under the system of township organization in Illinois, there is no board representing the corporate authority of the town, the electors only representing it, and they must act through town meetings or elections. The supervisor and town clerk, neither separately nor conjointly, are the corporate authority of their town. They are simply town officers, with limited duties to perform in respect to town affairs. They possess no power as town officers or under the statute, except under the direction of the corporate authorities (the electors) to do any act in regard to making corporate subscriptions or issuing bonds. The town must act through its electors, either to ratify the act already done, or to authorize an act subsequently to be done.

Williams vs. Town of Roberts, 88 Ill., 11.

The case of Roberts vs. Bolles, 11 Otto, 127, is not in con-

flict with this doctrine, and does not conflict with this case of the Town of Elmwood vs. Marcy, 92 U. S., 289.

By the thirteenth section of the charter of the railroad company in questino, an election is required; a town meeting would not authorize the officers of a town to act under its provisions. The rule is, that where a law for an election to determine whether a subscription, etc., should be made by a town in aid of a railroad corporation, provides for the holding of an election, etc., in such towns, and an election held in such town on the question, as in ordinary town meeting, presided over by one moderator, with only one clerk, is void, and will confer no authority to issue the bonds of the town. The words "town meeting" and the word "election" are not convertible terms. An election in Illinois is by law required to be held by three judges and two clerks. The words "town meeting" have a definite and well-settled meaning in the township law of Illinois, and are always used to describe the annual meeting of the electors of the town for the purpose of electing town officers and transacting such other business as the electors are authorized to transact, or special meetings of the electors for such purpose called pursuant to law.

Section 56 of chapter 139 (Cothran's Statutes of Illinois, 1881), page 1,499, provides for judges of elections as follows:

"Section 56. *Ex-officio Judges of Elections.* The supervisor, assessor and collector of the town shall be *ex-officio* judges of all election in their town, except as otherwise provided by law."

In same statute, page 622, section 37, provides as follows: "*Clerks of Election.* The judges of election shall choose two persons having similar qualifications with themselves, to act as clerks of election, who may continue to act as such during the pleasure of the judges."

In the same statute page 1499, sections 62, 63, 64, 65 and 66, provide for the holding of town meetings as follows:

"SEC. 62. *Organizing Town Meeting—Moderator* "The electors present, at any time between the hours of eight and nine o'clock in the forenoon of the day on which there is an annual

or special town meeting, shall be called to order by the town clerk, if there be one; in case there be none, or he is not present, then the voters may elect by acclamation one of their number chairman. They shall then proceed to choose one of their number to preside as moderator of such town meeting."

"Section 63. *Powers of Moderator.* The moderator shall have the same power and be subject to the same penalties as other judges of election."

"Section 64. *Oath of Moderatior.* Before the moderator of any town meeting shall enter upon the duties of his office, he shall take an oath faithfully and impartially to discharge the duties of such office—which oath may be administered by the town clerk, or other proper officer."

"Section 65. *Clerk—Minutes.*. The town clerk last before elected or appointed, shall be the clerk of the town meeting, and shall keep faithful minutes of its proceedings, in which he shall enter at length, every order or direction, and all rules and regulations made by such meeting."

"Section 67. *Clerk pro. tem.* If the town clerk be absent, then such person as shall be chosen for that purpose by the electors present, shall act as the clerk of the meeting."

It will be observed that an election and town meeting, the purpose of each and the powers are wholly different and the distinction perfectly understood, by the people and the courts of Illinois, and *I believe the legislature understood the distinction when the township law was passed by that body.* It was the purpose of the legislature in enacting the charter that before a subscription could be made by a town, and before any bonds could lawfully issue, there should be an election held. It cannot be held that a town meeting will answer the purpose and requirement of a statute requiring an election. Where an election is required, (as in this case) to be held and conducted the same as in general elections, which law requires three judges of elections and two clerks, and where the election is held by one acting in the capacity of moderator of a town meeting, with but one clerk, it will be absolutely void and cannot form the basis upon which any rights can be created or enforced.

Lippencott vs. Town of Pana et al., 92 Ill., 25.

C. & I. R. R. Co. vs. Mallory, 101 Ill. 583.

People vs. Town of Laena, 67 Ill. 65.

The People vs. Town of Santa Anna, 67 Ill. 57.

The law under which it is claimed that the bonds were issued became a law on the 28th of February, 1867. The mass meeting or town meeting or proceedings had in relation to the issue of the bonds in question was on the 21st day of July, 1866. On this day there was no law authorizing the proceedings had on that day. The action of the meeting was without authority of law and was *absolutely void. It could have no force.* What those people did that attended the meeting on that day, did not perhaps, amount to a riot nor an unlawful assembly. They simply did in an orderly manner, an unlawful act. Their action had no element of power to bind the tax-payers of the town. The railroad had not been located or built, and was not incorporated for months afterwards.

The charter when passed and became a law, expressly provided, that no subscription should be made until the question of subscription should be submitted to the legal voters of the town, in pursuance of thirty days notice. (See Sec. 13 charter supra).

No notice of the meeting held July 21st, 1866, was given by the town or any of its officers. The town was in no way a party in the meeting. The most that can be said of this meeting is that it was a mass meeting of parties in the interest of this then contemplated railroad, and a vote was taken with a view of getting an expression of the people as to what they probably would do if a railroad should be incorporated and constructed through the town. This proceeding on July 21st, 1866, was not the exercise of a power of the electors of the town in an irregular or defective manner, but it was an act without the shadow or color of power, or authority.

The burden of showing that these bonds were issued in compliance with the vote of the people and that there was authority of law for their issue rests upon the defendant in error who is here affirming the validity of these bonds.

Jackson County vs. Brush, 77 Ill. 59.

Town of Prairie vs. Lloyd, 97 Ill. 191.

People vs. Jackson Co., 92 Ill., 441.

The bonds show upon their face that they are invalid. I do not contend that the validity of the bonds in question, that there is no record of a notice of the election kept on file, and that the records of the town fail to show the fact, but that there was no law either as to the holding of the election or requiring notice at the time, and no notice was in fact given, and but a minority of the electors of the town took any part in the meeting, and those that did not and those that did take part, are not bound by the action of this meeting, and this without regard to whether notice was given or not. There was in fact, no compliance with the requirements of the election laws of the State, nor was any authority of law upon which the proceeding could be based.

In the case of J. N. W. & S. E. R. Co. vs. Town of Virden, 104 Ill., p. 344, the court say: "It has been frequently held that the election can be ordered only by persons or functionaries designated by the law—that an election called by any other person or body is absolutely void, and so of all acts growing out of or performed under it." See

Schuyler County vs. Farwell, 25 Ill. 181.

Clark vs. Hancock Co., 27 Ill. 305.

Marshall County vs. Cook, 38 Ill. 44.

These cases are decisive of this question. The allegation standing confessed that election was ordered by the president and trustees is fatal to the validity of the bonds involved in this case, and being void there was no error in enjoining the collection of taxes for their payment, or interest thereon, and the decree of the court below must be affirmed.

In the case of Schuyler County vs. Farwell, decided in 1860, the authority was conferred on the county court to act in the matter, the county having adopted township organization, and the acts required to be done by law by the county court were performed by the board of supervisors, and the

county court took no part in them, and the obligations issued were held not to be binding on the county.

In Clark vs. Hancock County (decided in 1862) it is held that where county bonds to aid the construction of a railroad have been issued in pursuance of an election held without warrant of law, as where it had been ordered by a person or tribunal having no such authority, they are absolutely void. And in Marshal County vs. Cook, 38 Ill., 44, it is held that where the election is called by the wrong authority, the bonds are void. In fact, the rule has been in force on this question from the time the question was first presented to the Court in the Schuyler county case, in 25 Ill., down to the present time, and all purchasers of municipal securities were bound to know by what authority the bonds were issued. The rule of decisions in Illinois has been uniform on the question, that all persons dealing in securities issued by a municipal corporation are chargeable with a notice of a want of authority in their creation. This was the law when these bonds were issued, and there has been no deviation from this rule. Even if the proceedings on July 21st, 1866, constituted an election, the action would have been void, for the reason that it is essential to the validity of an election that it be held at the time and in the place provided by law, and must have been ordered by the proper authority.

Stephens vs. The People, 89 Ill., 337–343.

On the 21st day of July, 1866, the railroad in question had not been incorporated, surveyed, or its starting point or terminus legally fixed, and for this reason an election held on that day would have been a nullity, and the bonds void.

Mullen vs. Lansing, 9 Blatch., 512.

The meeting of the People on the 21st day of July, 1866, and their action in relation to the issue of bonds in question was without authority of law, and their action a nullity.

In the case of Allen vs. Louisiana, 103 U. S,, p. 80, it is held that a popular vote in favor of a municipal subscription for stock of a railroad company, cast at an election held without authority of law, does not bind the municipality, nor confer

the power to make the subscription. The Court, Waite, C. J., delivering the opinion, closes the opinion by saying: "It has been uniformly held that until the legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality or confer on authorities the power to make such a subscription. The legislative authority to obtain the popular assent is as essential to the validity of an election as it is to the subscription."

It cannot be said that the town of "Santa Anna" ever consented to the creation of this debt. The so-called vote of July 21st, 1866, was an idle form. "Persons opposed to the subscription were under nonecessity or obligation to vote against it because they had a right to regard the entire proceedings as a nullity. The vote can no more be accepted as the action of the town, or as giving the consent of the town to the creation of this debt, than would a resolution adopted by the same number of persons at one of their dwellings or in a casual encounter at a street corner. Neither can the subsequent issue of the bonds * * * * be taken as showing the assent of the town. That was the mere ministerial act of the supervisor and clerk."

Marshall vs. Silliman, 61 Ill. 224.

In further support of this proposition see

Schuyler Co. vs. The People, 25 Ill. 181.

Hancock County vs. Clark, 27 Ill. 305.

Marshall Co. vs. Cook, 38 Ill. 44.

In the case of Gaddis vs. Richland Co., 92 Ill. 124, the Court in following these cases said: "The power then having been conferred on the county court it could alone act in carrying out the power. No other functionary, body or individual could act, simply for the want of power. See

Schuyler Co. vs. The People, 25 Ill. 181.

Marshall Co. vs. Cooke, 38 Ill. 45.

Clark vs. Board of Supervisors, 27 Ill. 305.

Force vs. Town of Batavia, 61 Ill. 99, and

Harding vs. Rockford, Rock Island and St. Lous Railroad Company, 65 Ill. 90.

The first of these two cases is in point, as the material facts of the two cases are similar, and not distnguishable, so that the court will observe that these early cases have been uniformly followed by the courts in this State.

The meeting having been held without authority of law, not called by any suthority having power to call it and conduct it; that without such authority no subscription could be made

Quincy vs. Cooke, 107 U. S. 553.

I apprehend that it will be conceded that the bonds in such suit are void, unless the same were authorized by the so-called curative provision of section 13 of the charter of the railroad company, wherein it is

Provided that where elections may have alrsady been held and a majority of the legal voters of any township or incorporated town were in favor of a subscription to said railroad, then and in that case, no other election need be held. And the amount so voted for shall be subscribed as in this act provided. And such elections are hereby declared to be legal and VALID *as though this act had been in force at the time thereof, and all the provisions hereof had been complied with.*

I think it will be conceded that in cases of townships at least, there is no power vested in the town to make a subscription and issue bonds in payment therefor without the assent of the electors of the town at an election lawfully held, for that purpose. The rule is that if the legislature might have provided for the issue of the bonds in question without submitting the question to a vote of the electors of the township, then the legislature might by subsequent legislation, retrospective in in its character, cure the defect in an illegal vote or proceeding. That is if the omission is such that the legislature might by prior legislation have made immaterial, such act or omission may be made immaterial by subsequent legislation. But if the act or omission that the legislature could not have dispensed with by prior legistation, then the legislatu.e cannot

dispense with such or supply such omission by subsequent legislation.

Town of Fox vs. Town of Kendall, 97 Ill. 73.

The supervisor and town clerk of a township cannot in any manner exercise the taxing power, having no power to levy, assess or collect taxes. They are selected with a view to the creation of any municipal indebtedness, and consequently without the aid and consent of the taxing power (the electors) of the town they have no power to create a municipal indebtedness. Boards such as boards of supervisors, county commissioners, &c., and the municipal authorities of incorporated towns and villages under the constitution of 1848, might be empowered by proper legislation to subscribe to the capital stock of a railroad company without first submitting the question to the electors of the municipality. See Quincy vs. Cooke, 107 U. S. 555. But in the case of townships there must be a popular vote, and the vote of the people of a town to subscribe to the capital stock of a railroad company in the absence of any law authorizing such a vote on subscription, is not binding upon the town.

Barnes vs. Town of Lacon, 84 Ill. 461.

This case is clearly distinguishable from the cases of

Keithsburg vs. Frick, 34 Ill. 405.

Q. M. & P. R. R. Co. vs. Morris, 84 Ill. 440 and

Quincy vs. Cooke, 107 U. S. 549.

The doctrine here contended for is clearly recognized by this court in the case of Quincy vs. Cooke, where the judgment was affirmed upon the doctrine of the case of Keithsburg vs. Frick and other cases following it. The distinction between liability of the officers of a township and counties, cities, towns and villages is so clearly made that, as it seems, there can now be no mistake in determining the powers of each.

At the time of the pretended election, town or mass meeting, held July 21st, 1866, the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company had not become a law and did not until February 28th, 1867. Therefore there was no law author-

izing the election or meeting. The action had was without validity and there being no authority of law for the proceeding, the same was void, and there was therefore no authority vested in the legislature to give vitality to the proceedings of July 21st, 1866. The bonds were consequently issued without the consent of the electors at an election authorized by law. The legislature having no power to create an indebtedness against the town, the bonds are absolutely void.

Marshall vs. Silliman, 31 Ill. 218.

Wiley vs. Silliman, 62 Ill. 170.

Town of Elmwood vs. Marcy, 92 U. S. 289.

McClure vs. Township of Oxford, 4 Otto 429.

Town of East Oakland vs. Skinner, 4 Otto 255.

Williams vs. The Town of Roberts, 88 Ill. 12.

Barnes vs. The Town of Lacon, 84 Ill. 461.

The Poople vs. Jackson Co., 92 Ill. 441.

Gaddis vs. Railroad Co., 92 Ill. 119.

Lippencott vs. Pana, 92 Ill. 24.

English vs. The People, 96 Ill. 566.

Bissel vs. The City of Kankakee, 64 Ill. 249.

Schaffman vs. Bonham, 95 Ill. 382.

Hewitt vs. Normal School District, 94 Ill. 532.

Pitzman vs. Village of Freeburgh, 92 Ill. 111.

Ryan vs. Lyuch, 68 Ill. 160.

Quincy vs. Cooke, 107 U. S. 555.

In Marshall vs. Silliman, 61 Ill., 218, it is held that an election held without authority of law is void, and confers no power on the town authorities to issue the bonds of the town, and that in case of such a void proceeding the legislature has no power, under the constitution, to pass a law rendering the election and subscription valid. That such act would have the effect to compel a municipal corporation to incur a debt for

purely a local purpose. It is again held in Wiley vs. Silliman, 62 Ill., 170, that when the people of a township at an election voted in favor of a subscription to a railroad company without any authority of law, the general assembly afterwards passed a special act declaring the election and subscription made under it to be legal and binding upon the township; that the election and subscription were null and void, and as the legislature could not create a debt against a municipal corporation without its consent, the curative act was void.

The doctrine of these cases was affirmed in the case of The Cairo and St. Louis R. R. Co. vs. The City of Sparta, 77 Ill. 205. In this case it is held when a municipal corporation submits an unauthorized proposition to issue its corporate bonds in aid of a railway company, which is carried and which therefore imposes no liability on the corporation, it is not within the constitutional power of the legislature to validate such vote so as to compel the issue of bonds voted. The city of Sparta, under an act of similar character, refused to issue bonds, and the court sustained the city. The Court will bear in mind the distinction made by our Supreme Court between the power of city and township to issue bonds. A city, as in Frick's case, 34 Ill., 405, may issue bonds where the township authorities could not, and on p. 509, 77 Ill., the court affirmed the doctrine of the Silliman cases fully. The case of Marshall vs. Silliman is again affirmed in Middleport vs. Ætna Life Ins. Co., 82 Ill., 567. Again in Barnes vs. The Town of Lacon, 84 Ill., 461, it is held that a vote of the people of a town to subscribe to the capital stock of a railroad company, in the absence of any law authorizing such vote or subscription, is not binding upon the town, and that where an election is held for the purpose of voting upon a subscription to a railroad company is held without any authority of law, and in pursuance of a vote at such election a subscription is made by the supervisor of the town, without any authority of law, the whole proceeding is void and the legislature cannot, by any subsequent act, legalize the same. That the legislature has no power to authorize the supervisor and town clerk of the town to create a corporate debt without the consent of the people, expressed at the polls. In this case, on page 463, the court, in speaking of the effect of

a curative act, says: "But the question arises whether the curative act, so-called, passed in 1869, can be regarded as giving vitality to the vote, or conferring power on the supervisor and town clerk to make a subscription or issue the bonds.

This is not a new question in this court. The precise point here presented arose in Marshall vs. Silliman, 61 Ill., 218, where a vote had been had in the town of Brimfield resulting in favor or a subscription ta the capital stock of a railroad company. At a special town meeting, called on the application of twelve voters under the general township organization law, which conferred no authority whatever on the township authorities to hold the election, but which election and vote were subsequently attempted to be legalized by act of the legislature; it was then held the legislature had no power, under the constitution, to pass a law rendering the election and subscription valid, as the effect would be to compel a municipal corporation to incur a debt for a purely local municipal purpose. It was also held that the legislature has no power to authorize a supervisor and town clerk to create a corporate debt without the consent of the people, expressed at the polls, as the power to impose taxes or create a corporate debt is not incident to their power. The decision is conclusive of the question here presented, and it is not necessary to repeat the reasoning upon which it is based, or go over the ground again. The authorities bearing upon the question are all referred to in the opinion, and under the rule there announced we must hold the curative act relied upon here, unconstitutional and void." The election in pursuance of which the bonds in suit were issued being void, the legislature was powerless to validate them.

Williams vs. Town of Roberts, 88 Ill., 11.

Thus the court will observe that the doctrine of the Silliman cases has become the settled doctrine of the Supreme Court of this State, and was followed by the Supreme Court of the United States in Town of Elmwood vs. Marcy, 2 Otto, 289.

These cases but follow the doctrine of cases of

Schuyler vs. Farrelf, 25 Ill. 181.

Hancock Co: vs. Clark, 27 Ill. 305.

People vs. Tazewell Co., 22 Ill. 147 and

Marshall vs. Cook, 38 Ill. 49.

These cases were decided long before the bonds in suit were issued.

It is upon this same principle that the Supreme Court of this State held in Lippincott vs. Town of Pana, 92 Ill., 25, that where an amendment to a railroad charter authorizes a subscription or donation by a town in aid of the road upon an affirmative vote of the people, at an election to be held and conducted as a special town meeting, presided over by a moderator, and not held by three judges, as under the general election law is required, will be a nullity and confers no power to issue bonds of the town in payment of the subscription or donation voted, and such bonds, if issued, will be void. Affirming the same case in 2 Bradwell, 466, this case follows a line of decisions in this State that the law as to elections must be observed or the bonds issued in pursuance of such illegal election will be void.

It may be that this opinion should be qualified as was done by this Court in Pana vs. Bowler, 107 p. 540. But as applicable to the case at bar the case of Lippencott vs. Pana, as decided by the state court is correct, and should be applied without any qualification. In the case at bar there was no authority of law for holding by the electors of the town of Santa Anna, either an election or town meeting for the purpose of authorizing the issue of municipal bonds of the town, while in the case of Pana vs. Bowler, the law gave full and explicit authority to hold an election, authorizing the subscription and the issue of the bonds. Therefore the power to act existed, and purchasers might well infer that the requirements of the law had been observed, and that an election had been held and presided over by judges duly qualified, with two clerks. The holding of a town meeting presided over by a moderator was in that case but a defective execution of the power vested in the electors of the town of Pana. But in the case at bar, no such presumption can or could arise for the reason that there was no statute authorizing the electors of the town to hold an

election or town meeting for the purpose of voting in favor of a subscription to the railroad company, and issuing the bonds of the town in payment therefor. There was no irregularity in this case in not holding an election in conformity to the statute but a clear *want of power*. There being on absolute want of power, the legislature was powerless to validate the action of July 21st, 1866, and not having power to give validity to the action had July 21st, 1866, the bonds are absolutely void, and would have been void even had a formal election been held. The fact being, that a town or mass meeting was held, the charter making no provision to validate or authorize the issue of bonds in such case, it cannot be that the curative clause of the charter can have any application to this case, even if the same should be held binding as to cases coming within its premises. The rule is that where the power of a town to issue bonds in aid of a railroad never existed the fact that the bonds were issued and on their face appear to be regular and recite that they were issued according to law affords no protection to an innocent holder, for value in such case is different from that in which the power to issue being sufficiently comprehensive, an innocent holder is justified in presuming from the recital in the bonds that the requirements of the law have been observed.

Thomas vs. Lansing, 14 Fed. Rep. 618.

Merrill vs. Monticello, 14 Fed. Rep. 628.

It is upon this principle that the case of Pana vs. Bowler, was decided by this court, and it is upon this principle that the bonds in suit should be held invalid.

What municipalities may be authorized to subscribe without a vote?

County boards, such as boards of supervisors, county commissioners, and the municipal authorities of incorporated cities. Towns and villages may, when empowered to do so by proper legislation, subscribe for the capital of railroad corporations without first submitting the question to the electors of the municipality, *they being considered as the representatives of the electors;* but under our township system there is no officer or

board representing the corporating authority of the town, the electors only representing it, and they must do so, necessarily acting through town meetings or elections.

Williams vs. Roberts, 88 Ill., 12.

What are the proper corporate authorities of a township to create an indebtedness?

The only power to create a local municipal obligation of a township by our system of township organization, is the vote of the town electors. Under the constitution of 1848 the legislature could properly confer upon a city the power to incur indebtedness and issue its bonds for a corporate purpose, without any vote of the people, but it could go no further. It could not compel a city or incorporated town to incur a debt unless the legislative department of a city or town saw proper.

C., B. & Q. R. R. Co. vs. City of Aurora, 99 Ill., 206.

Hessler vs. Drainage Comrs., 53 Ill., 110.

Livingston vs. Weider, Id., 218.

Marshall et al. vs. Silliman et al., 61 Id., 218.

Howard vs. St. Clair and Monroe Levee Drainage Co., 51 Id., 130.

The People ex rel. vs. Mayor of Chicago, Id., 30.

Wiley et al. vs. Silliman et al., 62 Id., 170.

Ryan vs. Lynch et al., 68 Id., 160.

Cairo & St. Louis Railroad Company vs. City of Sparta, 77 Id., 505.

Middleport vs. Ætna Life Insurance Company, 82 Id., 562.

Barnes vs. Town of Lacon, 84 Id., 461.

Town of Elmwood vs. Marcy, 92 U. S., 289.

The supervisor and town clerk, neither separately nor conjointly, are the corporate authority of their town. They are simply town officers with limited duties to perform in respect to town affairs. They possess no power as town officers, or under the statute, except under the direction of the corporate

authorities (the electors) to do any act in regard to making corporate subscriptions or issue bonds.

Williams vs. Town of Roberts, 88 Ill., 12.

See, also, Town of Douglas vs. Niantic Savings Bank, 97 Ill., 228.

Who are the corporate authorities to issue bonds voted by a township?

In the Town of Windsor vs. Hallett, 97 Ill., 204, it is held that under a law which authorizes the proper corporate authorities of a township to issue the bonds of the town when so authorized by a vote of the electors at an election called for that purpose, the supervisor and town clerk must be regarded as the proper corporate authorities for the issue and delivery of the bonds, it being but a *ministerail act*, though they are not such for the purpose of creating the indebtedness. *There is a broad difference between the creation of a debt and merely evidence of it.* See also Town of Prairie Grove vs. Lloyd, 97 Ill., 179. In the case of Town of Douglas vs. Niantic Savings Bank, 97 Ill., 228, it is held that while the supervisor and town clerk of the town are not the proper corporate authority of the town to determine whether such town shall assume a liability by subscription or donation to a railroad company, or to levy taxes to pay the bonds issued, or interest thereon; yet they are the proper functionaries, after such liability has been voted by the electors, to make the subscriptions or donations, and to issue the bonds in payment and discharge thereof. Thus it will be seen that the supervisor and town clerk have no power to create a liability. This can only be done by the electors of the town. The supervisor and town clerk are simply ministerial officers of the corporation to carry out the will of the electors when *legally expressed.*

The rule is that a municipality must have legislative authority to subscribe to a public enterprise before its officers can bind the body politic to the payment of bonds purporting to be issued on the part of the municipality.

McClure vs. Town of Oxford, 4 Otto, 429.

The bonds in suit having been issued without a previous vote of the electors, at an election that the taxpayers were bound to attend and recognize their issue, was illegal and without authority of law. The rule is that where bonds, as in this case, are issued without any power or authority of law, they are void, and no subsequent act or recognition of their validity by the municipal authorities can estop the tax-payer from denying their legality.

Ryan vs. Lynch, 68 Ill., 160.

Barnes vs. Town of Lacon, supra.

Town of Pana vs. Lippincott, 2 Brad., 466.

Same case, 92 Ill., 24.

The bonds of a municipal corporation issued in payment of its subscription to the stock of a railroad company are void unless the statute confers in express terms or by reasonable implicative authority to issue them.

Wells vs. Supervisors, 102 U. S., 625.

Township of East Oakland vs. Skinner, 94 U. S., 255.

The plaintiff is chargeable with notice of the fact that there was no authority of law for the issue of these bonds at the time of the pretended election. The election held on the twenty-first day of July, 1866, created no right and imposed no obligation, and the act incorporating the Danville, Urbana, Bloomington & Pekin R. R. Co., in so far as it may be regarded as a curative act, or an act to authorize the issuing of the bonds of the town, in pursuance of an election held prior to the passage of the act, is unconstitutional, because it attempts to create a debt against the town without the consent of the corporate authorities of the town.

These bonds held void by the Supreme Court of Illinois?

The taxes for the payment of the bonds and coupons in question was enjoined by the tax-payers of the town, and a decree of the Circuit Court of DeWitt county perpetually enjoining the tax. The case was taken the Appellate Court, and, affirmed, and from that court was taken to the Supreme Court, and is reported as Rutz vs. Calhoun, 100 Ill., 392. It is held

in this case that when bonds have been issued by a township to a railroad company, under a vote at an election held without authority of law, neither the State nor the local officers have authority to cause a tax to be levied for the payment of the principal or interest of such bonds, and they may be enjoined from attempting to do so in this case. It was conceded by the able counsel, Mr. Gere, that the bonds were void, and the court so held, and affirmed the judgment of the Appellate Court.

I respectfully submit, that under the rule announced in the Silliman and other cases cited from the Illinois Reports, and the cases of Allen vs. Louisiana, and Town of Elmwood vs. Marcy, decided by this Court, must control this case.

It would seem clear, from the foregoing authorities, that the law is that before a township in Illinois can create a legal obligation by the issue of its bonds in aid of a railway company, that before the supervisor and town clerk can act and issue the bonds for such purpose, there must be authority of law for holding an election, and an election held or attempted to be held, at least by which a majority of the voters should vote in favor of such aid, and until such power exist, the supervisor and town clerk are powerless to act, and until such action is had, the legislature cannot give validity to authorize the supervisor and town clerk to act in this regard. Suppose, for illustration, that a minorty, or even a majority of the electors of this township should meet on the first day of January, 1885, and vote to subscribe $200,000 to a contemplated railroad, an act prohibited by our present constitution; and suppose, further, that the people of Illinois should meet in convention and so amend the present constitution as to strike out the prohibitory clause, and restore the provision of the constitution of 1848, does anybody believe that the legislature could then give validity to such vote, and could any court be found that would give validity to the bonds? Will the law require an elector to pay any attention, or take part in any such unlawful action to protect his property. Certainly not. If not, then it must be held that the bonds in question are void, and that there was no legislative power to validate them.

The curative clause in the charter of the Danville, Urbana, Bloomington and Pekin Railroad has no application to this case. The words of the provision are: "*Provided, that where elections have already been held, and the majority of any incorporated town were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in this act provided, and such elections are hereby declared to be legal and valid at the time thereof, and all the provisions hereof had been complied with.*" In the first place, no election had ever been held in this township. Secondly, a majority of the legal voters of said township never voted at any election, town-meeting, mass-meeting or other gathering of the electors of the town, on the question of subscribing to the capital stock of this railroad company, nor the question of issuing bonds in aid of the construction of the same, cannot be regarded as official or the action of the town. The action (as shown by the records) of a few of the electors of said town, at a meeting held on the 21st day of July, 1866, cannot be construed as the holding of an election by the electors of the town. The word "election" in Illinois, and, I apprehend, in some of the other States, has a well-defined and settled meaning.

And it will be observed by the statutes above cited, in order to constitute an election, *it must be presided over by three judges, with two clerks.* It is in this sense that the legislature used the word "election" in the curative clause above cited. The word could have been used in no other sense. The word itself suggests all the necessary paraphernalia of an election under the statute.

The curative clause, so-called, was not passed with a view to the future action of the electors of the town; but was passed with a view if intended to apply to this township of curing a recognized defective, illegal and unwarranted action of a minority of the electors of the town, and thereby avoiding a submission in a legal manner to the electors of the town, the question for determination as to whether or not they, the electors of the town, were in favor of making a subscription to the capital stock of the said railroad company. In order to make the curative act applicable to a town which had previously voted

upon the question it must appear, *that an election had been held in the town for or against a subscription to the capital stock of said railroad, and that a majority of the legal voters of the town were in favor of a subscription to the capital stock of said railroad company.*

It would be just as reasonable to argue that the legislature used the word election in the sense of a mass meeting presided over by a president as to argue that they used the word in the sense of a town meeting. When the legislature of 1867, used the word election there was not a man in either branch that did not understand the full force and meaning of the word, and the well defined distinction between an election and a town meeting, and they determined by the curative clause, so-called, so far as they had power to do so, that no bonds should be issued by any township along the line of the road unless the same had the sanction of a majority of the legal voters of the town expressed by ballot at an election held and presided over by the three officers of the town, assisted by two clerks, who are made by law the judges of all elections, except as otherwise provided. The legislature never intended to ratify or give in any manner validity to the action of the electors of any town expressed in any other manner than through an election presided over by the three judges together with two clerks as authorized by statute, as in case of general elections. If the legislature had intended to ratify and give validity to the action of the electors expressed at a town or mass meeting they would have said so.

If the legislature had power to enact the curative clause, they certainly had the power to limit the cases to elections as they have done to cases or to towns along the line of said railroad where elections had in fact been held.

A town meeting is not an election, as held by the court in the case of Lippencott vs. Pana, and other cases cited, and this principle is recognized by this court in Pana vs. Bowler, above cited.

The history of voting railroad aid in the western states is a sufficient answer to any and all theories that the legislature intended the curative clause to apply to cases where elections had not been held previous to the passage of said act.

The record shows that no election had been held; that something in the nature of a town or mass meeting was in fact held, and that a majority of the legal voters of the town did not vote for the subscription.

That there is no power vested by law in the supervisor and town clerk authorizing them to issue the bonds of the town in aid of a railroad company without authority legally expressed by the electors of the town is clear upon principle and authority. The electors of the town not having in any manner acted in this matter in any mode presented by statute or the curative clause, the bonds are absolutely void, and the action of the supervisor and town clerk in the issuing of said bonds was illegal and the bonds are void.

The bonds in question are void for the following reason: They were issued in blank and not to bearer, when the charter required that should be issued to the Danville, Urbana, Bloomington and Pekin Railroad Company. They were and are still incomplete.

Jackson vs. Vicksburg, Shreveport R. R. Co., 2 Wood's Rep., 141.

Ledwick vs, McKim, 53 N. Y., 307.

A negotiable instrument must be complete and perfect when it is delivered, or there must be authority reposed in some one to afterwards supply that which is needed to make it perfect.

The supervisor and town clerk could not delegate authority to perfect these bonds. They had no authority to deliver the bonds in blank nor were they authorized to consent or agree that blanks might be filled and the instruments completed. See authorities supra: also Jackson County vs. Brush, 77 Ill., 59, where it is held that if the people of a county be authorized to issue bonds upon condition they have no power to issue the same in blank as to date and place the same in the hands of trustees to be dated and delivered when the conditions are performed.

The county authorities cannot delegate power to others to determine when the conditions are performed, but must determine that fact themselves.

As the authorized agents of the people such acts is an official trust and cannot be delegated. So we insist the issuing of the bonds in question in a complete form was an official trust which could not be delegated, and that the supervisor and town clerk had no authority to deliver them in blank and authorize their completion.

The bonds are not made payable to bearer, nor did the charter of the railroad company contemplate that they should be issued to bearer. The bonds were simply issued in blank, and it is averred in the declaration that they were delivered to the said railroad company and by said railroad company transferred to the plaintiff by delivery. For these reasons I submit that no action can be maintained upon the bonds in their present condition, by the plaintiff.

The judgment is for too much.

The court allowed the plaintiff and the judgment was made up as follows: Thirty-two one hundred dollar bonds, two five hundred dollar bonds, making $4,200 *and 32 coupons* $19 *each, 2 coupons* $50 *each, making* $4,620, *due on bonds and coupons, Oct. 1st,* 1877. *The interest on the amount of coupons,* $4.20 *at 6 per cent. from Oct. 1st,* 1877, *to April 19th,* 1884, *the date of the judgment, six years six months and nineteen days, amounted to* $165.16. *The interest on the bonds,* $4.200 *at ten per cent. per annum, from Oct. 1st,* 1877, *to Arpil 19th,* 1884, *the date of judgment, for six years six months and nineteen days, amounted to* $2,772.06, *making in all of principal and interest due on the bonds and coupons in suit,* $7.557.22. *The judgement April 19th,* 1884, *was for* $8,014.86, *the judgment being for* $451.64 *too much.*

This sum of $451.65, we suspect, was made up by compounding the interest on the bonds in suit, from the date of the maturity of the bonds to the date of judgment; that is to say, the interest was compounded at ten per cent. per annum on the bonds from the date of their maturity to the date of the judgment. The statutory rate of interest in Illinois was in 1867, and ever since has been six per cent. per annum. The Statute, Sect. 1, chap. 74, Cothran's Statute, p. 851, provides as follows:

"Section 1. *On loan or forbearance of money, etc.* That the rate of interest upon the loan or forbearance of any money, goods, or thing in action shall continue to be six dollars ($6) upon one hundred dollars ($100), for one year, and after that rate for a greater or less sum, or for a longer or shorter time except as herein provided."

The bonds were issued in and made payable in DeWitt county, Ill.

After the bonds matured they only drew the statutory rate of interest.

Burnhisel vs. Firman, Assignee, 22 Wall., 170.

Which is six per cent. See Hansbrough vs. Peck, 5 Wall., 497.

Interest on the bonds after maturity could only be allowed as damages, and this must be according to the *lex fori.*

Goddard vs. Foster, 17 Wall., 125.

At the common law interest was not allowed in any case there is no averrment in the declaratoin of a demand for the payment of the coupons. Until a demand is made a municipal corporation is not in default. They are not, like individuals, bound to seek their creditors to make payment of their indebtedness, and are not liable for interest.

City of Pekin vs. Reynolds, 31 Ill., 531.

There is no agreement on the coupons to pay interest. In such case the plaintiff in error is not liable to pay interest on its coupons.

City of Chicago vs. the People, 56 Ill., 334.

Johnson vs. Stark County, 24 Ill., 75.

This declaration is insufficient.

Madison County vs. Bartlett, 1 Scam. (Ill.) 67.

I. C. R. R. Co. vs. Cobb, Blaisdell & Co., 72 Ill., 152, and cases cited.

This doctrine has been uniformly followed by the State courts in this State, and in the case of Park Commissioners vs.

Dunlap, 91 Ill., 49, it is held that a municipal corporation is not liable to pay interest in the absence of any agreement to to that effect. In the case of the City of Chicago vs. Allcock, 86 Ill., 385, the court say: "Interest cannot be recovered in this State in any case, except where the statute authorizes it. At common law it could be recovered in no case, except where there was an express agreement to pay. Interest may then be regarded as depending upon and as the creature of the stat. ute. Madison County vs. Bartlett, 1 Scam., 67; City of Pekin vs. Reynolds, 31 Ill., 529; I. C. R. R. Co. vs. Cobb, Blaisdell & Co., 72 Ill., 148."

What we claim is that there was no agreement to pay interest, and consequently there was no liability. See also Parsons on contracts, Vol. 3 p. 152. The judgment is clearly for too much. There is no principle upon which it can be maintained.

Again the curative clause, so called, can have no application to this case, for the reason that the majority of the legal voters did not vote at the meeting of July 21st, 1866.

This clause of the charter cannot be construed as meaning a majority of the persons or voters voting, but should be construed to mean just what it says—a majority of the legal voters. Again, the words of the curative clause, "And such elections are hereby declared to be legal and valid as though this act had been force at the time thereof, and all the provisions hereof had been complied with." This provision simply attempts to give validity to a void act. This cannot be done.

Gaddis vs. Richland Co., 92 Ill., 119.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in admitting the bonds and coupons in evidence.

2. The court erred in rendering judgment for the plaintiff.

3. The court erred in not rendering judgment for the defendant.

4. The court erred in rendering judgment for the plaintiff for too much.

5. The court erred in holding as a matter of law that the plaintiff could recover under the pleadings and evidence in the case.

HAMILTON SPENCER,
Attorney for Plaintiff in Error.

THOMAS F. TIPTON,
Of Counsel.

UNITED STATES OF AMERICA.

IN THE

SUPREME COURT

OCTOBER TERM, A. D. 1884.

BAR ASSOCIATION

NO.

TOWN OF SANTA ANNA, *Plaintiff in Error,*

v.

AUGUSTUS FRANK, *Defendant in Error.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

T. C. MATHER,

ATTORNEY FOR DEFENDANT IN ERROR.

SPRINGFIELD, ILL.:
H. W. ROKKER PRINTER AND BINDER.
1884.

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STATEMENT OF THE CASE.

The subject matter of this action are overdue bonds of the township of Santa Anna, Champaign Co., Illinois.

Their recitals show the authority under which, and the purpose for which, they were issued, and are as follows:

"This bond is issued under, and by virtue of a law of the State of Illinois, entitled 'An act to amend the articles of Association of the Danville, Urbana, Bloomington & Pekin Railroad Company, and to extend its powers and confer a charter upon the same.' Approved February 28th, 1867, and in accordance with the vote of the electors of said township at the special election held in accordance with said act."

The bonds were issued and bear date October 1st, 1867, and any irregularities in their issue, or in the special election authorizing their issue, is sought to be cured and ratified by a certain provision contained in the aforementioned act of the General Assembly of Illinois, viz: § 13, which reads as follows:

See 16 Wall. pp. 645–6.

Consequently, the question involved herein is the same that has been considered heretofore by this Court in quite a number of suits, and is yet not conclusively settled, viz: Whether it was competent for the General Assemby of Illinois, in view of § 5, Art. 9, of the State Constitution of 1848, to enact currative legislation, such as is contained in § 13 of the Act of February 28th, 1867, last above quoted.

BRIEF AND ARGUMENT.

In the case of *St. Joseph Township* v. *Rogers*, 16 Wall. 644, decided by this Court in December, A. D. 1872, bonds of this same class, issued under the same Act, and precisely like them in legal status, were involved and held to be binding upon St. Joseph township. The Court then disposing of this since much mooted question, by saying, "that argument to show that *defective* subscriptions of the kind may in all cases be ratified, when the Legislature could have originally conferred the power, is certainly unnecessary, as the question is *authoritatively settled*, by the decisions of the Supreme Court of the State, and if this Court, *in repeated instances*."

Since then the case of *Elmwood* v. *Marcy* came before this Court at its October term, 1875, involving the same question, and was decided differently from the St. Joseph case by a divided Court.

Subsequently to this again, the same question involved in quite a number of suits came before his honor Justice Harlan and Judge Treat holding the Circuit Court, Southern District of Illinois, and the *St. Joseph* v. *Rogers* decision was adhered to, and judgments sustaining the validity of several different issues of bonds issued under this same ratifying act of the Legislature, and in aid of this same railroad, were rendered, from which writs of error or certificates of division, were taken to the October term of this Court, 1883, in the cases of

Township of St. Joseph
v. No. 913.
John M. Quackenbush.

Township of Urbana
v. No. 909.
Matthew M. Bolles.

Township of Urbana
v. No. 911.
First National Bank of Danville.

Township of Urbana
v. No. 910.
Ætna Life Insurance Co.

City of Quincy
v. No. 1043.
Cook, Executrix, etc.

where all these judgments were affirmed by a divided court, and have since been collected.

The question now recurs in these still pending suits whether these fragmentary issues of bonds remaining unpaid, must be paid in accordance with the direct ruling of this Court in *St. Joseph* v. *Rogers*, and in accordance with the *practical effect of these affirmances* by a divided court in the cases submitted at the last term above mentioned, or must the divided opinion of this Court in the single case of *Elmwood* v. *Marcy* become now the law of this question?

His Honor, Judge Davis, in delivering the opinion in *Elmwood* v. *Marcy* says:

"We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of my brethren *who agree to this opinion might take* a different view of them. * * * There has been no conflict of judicial opinion in Illinois on the controlling question in this suit, but on the contrary settled uniformity."

In that case a minority of this Court filed a strong dissenting opinion, in which they show a contrary understanding about there having been a *settled uniformity* in the Illinois Supreme Court decisions upon this controlling question.

So that according to His Honor, Judge Davis' statement in that opinion, had not the majority of the Court with him thought that *there had been a settled uniformity* upon this controlling question in the decision of the Illinois Supreme Court, we may assume the *Elmwood case* would have followed the Rogers decision instead of departing from it, as in that event some of the Court which agreed with him might have taken a different view.

Whether or not there had been a settled uniformity in the Illinois Supreme Court decisions upon this controlling question prior to the issue of these bonds is just what produces the whole con-

troversy and difference of opinion in these cases.

The Elmwood decision contains the doctrine, that where the State Supreme Court has taken different views of its constitutional provisions or laws at different times, there this Court will follow the first and ignore the latter, so that rights acquired under the former decisions may not be lost under a change in the opinion of the Court.

2 Otto. p. 294.

Now supposing it to be made to appear that there has been no settled uniformity in the decisions of the Illinois Supreme Court upon this question, then, according to the Emwood decision itself, this court will disregard the later State Court decisions and follow those which stood as the law when the bonds were issued.

As we have said, these Santa Anna bonds were issued October 1, 1867.

It is conceded on all sides of the argument that long after that date, and commencing in 1871, the Illinois Supreme Court has been holding that under tde provision of the Illinois Constitution referred to, it was not competent for the Illinois Legislature to clothe the Supervisor and Town Clerk of a township with power to incur a town obligation to aid a railroad with its bonds without a vote of the electors under a law in existence at the time, authorizing the vote. That to do so would be to force a debt upon its people without their consent.

But the material inquiry is not what that Court has held *since* these bonds issued nor how often they have *since* so held, but, what had that Court held or intimated in this direction *before*, and up to, their issue; because, if they held one way *before*, and another way *since*, their issue the rule in the Elmwood case

authorizes the ignoring of the later decisions so as to save rights acquired before a change in the opinion of the Court.

Upon this important inquiry, numerous arguments have already been submitted, supported by authority, and it may hardly be justifiable to go over the ground again in detail without being irksome to the Court. Suffice it in this case to merely refer again to the leading points and authorities in our behalf.

We insist that the doctrine of the Illinois Supreme Court was radically different before, and up to, the date of issue of these bonds, as to the legislative power under the Constitution of 1848, to ratify or cure the void acts of municipalities incurring debts to be paid by taxation, from what its doctrine has since been.

In *Cowgill* v. *Long*, 15 Ills., 202, a school tax voted contrary to the law by the electors of a school district was held by the Court to be void, and yet the subject of legislative ratification without being obnoxious to Section 5, Article IX. of the Constitution, (decided in 1853.)

The same limitation in Section 5 of Article IX, against the legislature conferring power to tax on other than corporate authorities applies to a school district that does to a township.

The *electors* of a school district are *its* corporate authorities, so they are of a township (by the recent decisions of our Supreme Court.) 97 Ill. 211, *Town of Windsor* v. *Hallett*.

If, then, this provision of the Constitution is not violated by the legislature ratifying the absolute void act of the electors of a school district, and its doing so is not forcing a debt on them without their consent otherwise manifested than by this empty vote, why is it more violative of this provision, or more the forcing of a debt on a township by the legislature ratifying the void election of *its* electors?

In the precise *principle* involved, we can see no difference between what the Illinois Supreme Court justified in this decision, in 1853 as to school districts, and what that Court has since 1871 refused to justify as to townships.

Both school districts and townships are expressly named in § 5 of Art. IX. And the same limitation necessarily applies to the Legislative dealing with both.

Where is the possible difference in principle between Legislative ratification of the void act of the electors of one, and that of the other?

If constitutional to ratify one in 1853, why not equally so to ratify that of the other in 1867?

In *Keithsburg* v. *Frick*, 34 Ill., 405, (decided in 1864), the Supreme Court held it competent for the Legislature to ratify the void subscription to railroad stock, made by a president and board of trustees of a village, and without other consent of its people by vote or otherwise.

The Supreme Court has since attempted to distinguish that case from a township, on the ground that the trustees were elected *directly by the people*, for the purpose of imposing taxation, and therefore to ratify their *void* subscription or tax was not forcing a debt on the people.

Why is it not less forcing a debt on the people to ratify the *void debt* (or consent) of the *electors themselves*, than that of their mere representatives?

What the electors themselves attempt to do, though it may be without legal authority at the time, at least shows *their consent* to it, whereas a majority of them may have never voted for the rep-

resentatives, or contemplated in the remotest degree that they would ever attempt a subscription to railroad stock.

If ratification is justifiable at all, why not ratify the void act of the *principle* rather than that of the *agent*?

So that, when it comes to the real principle involved, there is no distinction between the case of a township where its *electors themselves* have voted consent to subscribe and issue bonds, and the act of village trustees doing it, except that it is more equitable to ratify what the electors themselves have given consent to than the acts of their agents, which may not have been in the contemplation of the *electors* at all.

If the *electors* of a township had never voted consent, and the legislative attempt was to authorize the supervisor and clerk without such vote, to subscribe and issue the bonds, then the case might be different.

Section 13 of the Act of Feb. 28, 1867, only attempts to authorize the subscription and bonds where there has been a favorable vote of the *electors* therefor, and limits the subscription and bonds in amount to the sum so voted.

16 Wall. p. 646.

Such ratification then as this section 13 contemplates is *not* conferring the power of taxation on other than the corporate authorities of a township, because the corporate authorities (the electors) have exercised that power for themselves, have voted the bonds, given their consent, irregularly it is true; and yet all that the Legislature seeks to do by § 13, is to ratify and legalize this irregular consent, and vote. So that it is no longer a constitutional question under § 5 of Art. IX, but simply a question whether the Legislature can ratify and cure an irregular exercise of power on the part of the *corporate* authorities themselves.

This they can always do where it would have been competent to have conferred the power in the first instance; and who will question but that the legislature, under the provision in question, could have conferred power in advance upon the electors of the township to have burthened themselves with this debt by vote? Hence subsequent sanction is equivalent to original authority.

Cooley's Con. L., 4th Ed., ch. 8, p. 278 (n. 2.)
Ibid ch. 22, pp. 474–5.
In re. E. R. Tuller, 79 Ill., 99.
U. S. Mfg Co. v. *Gross*, 93 Ill., 483.
Cowgill v. *Long*, 15 Ill., 202.
Keithsburg .v *Frick*, 34 Ill., 405.

Some of our associates in these cases in their briefs heretofore filed with labor and painstaking have collated the early Illinois decisions which show that prior to the issue of these bonds the doctrine of the court was that the legislature had supreme control over townships and other municipalities named in Section 5 of Article IX. and might impose debts upon them *without their consent*. We borrow their citations and insert here

Town of Freeport v. *Board*, 41 Ill., 495.
Bush v. *Shipman*, 4 Scam., 186.
County of Richland v. *County of Lawrence*, 12, Sec. 1.
Trustees v. *Tateen*, 13 Ill., 28.
Bradley v. *Case*, 3 Scam., 585.

The cases relied upon by our opponents in 51 and 53 Ill., as holding a different doctrine from *Cowgill* v. *Long* and *Keithsburg* v. *Frick*, were decided *after* these bonds issued, and in 1869, and hence do not involve the present question at all, for the authorities there, upon which the legislature conferred the power

of taxation, were neither the electors (as here) nor their suffrage representatives.

It has only been since 1871 in the case of *Marshall* v. *Silliman*, 61 Ill., 218 and subsequent cases that the Illinois Supreme Court has announced a doctrine that at all conflicts with our rights of property in these bonds.

Hence our rights are within the protection of the specific rule of this Court reiterated in the Elmwood case that the former decisions of the State Court will be followed instead of the latter, so as to prevent a loss of rights by a change in the opinion of the Court.

One of the best evidences that the Illinois Supreme Court decisions prior to the issue of these bonds were in harmony with their validity, is the fact that this Court in 1872, (and before the appearance of the *Marshall* v. *Silliman* decision) announced that the act of Feb. 28, 1867, was sanctioned by *repeated* adjudications of that Court. Referring doubtless to *Cowgill* v. *Long*, *Keithsburg* v. *Frick*, and perhaps some of its decisions where it sanctioned the right of the Legislature to impose obligations upon such municipalities without their consent.

Had it *then* been, that *there was* a "*settled uniformity*" *as subsequently* announced in *Elmwood* v. *Marcy* in the decisions of the Illinois Supreme Court *contrary* to the constitutionality and validity of such character of curative legislation as is contained in § 13, of the Act of Feb. 28, 1867, instead of the point "*being authoritatively settled* (favorably to the constitutionality and validity) by decisions of the Supreme Court of the State in *repeated instances*" (as announced prior in *St. Joseph* v. *Rogers*). How is it that not a dissenting opinion of this Court was registered in the *St. Joseph* v. *Rogers* case?

The report of the *Rogers* case in 16 Wall., containing the instructions of the Circuit Court excepted to, and appealed from, and the points and briefs relied on by counsel *pro* and *con*, raised the identical points of controversy now before the Court in these subsequent suits. The question of the conflict of this curative act of the Legislature with the constitutional provision cited, under the *then* Illinois decisions, was fully raised, considered, and adjudicated.

16 Wall. pp. 654 to 663, both inclusive, and notes at bottom.

The case went off upon the solemn adjudication that such curative legislation in Illinois, under its constitution of 1848, and its "repeated" Supreme Court adjudications thereon was competent, constitutional, and valid, and not a warning voice of the Court registered against it. Three years thereafter intervened with this high record before the commercial world, inviting monied interests to invest in this large issue of 10 % bonds to the Danville, Urbana, Bloomington & Pekin railroad, with the assurances they were doubly adjudged valid, both by the United States and the Illinois Supreme Courts.

Then comes the divided opinion of this Court in *Elmwood* v. *Marcy*, in 1875, and the still further divisions at the October term, 1883.

There is a legal principle sometimes acted upon by Courts that, where it is *doubtful* whether the corporation has power to issue bonds, yet if the municipal authorities have construed their charter, as giving the power, and the bonds have been issued, and are in the hands of *bona fide* purchasers for value, the Court will adopt the municipal construction.

Van Hostrup v. *Madison City*, 1 Wall. 297.

Meyer v. *City of Muscatine*, *Id.* 384

James v. *Milwaukee*, 16 Wall. 162.
Adams v. *Lawrence Co.*, 2 Pitts R. 64.
Woodhull v. *Beaver Co.*, 3 Wall. Jr., 278.
Clemens, C. S. 28.

Upon this question, where the Courts differ so, why should not the power of the towns be said to be *doubtful;* and where their officers, and electors have *construed* the act of Feb. 28, 1867, as giving them the power to subscribe and issue bonds, and those bonds have been sold, and are in the hands of *bona fide* purchasers, why should not this equitable rule of law apply and throw the loss upon the towns whose voluntary acts, and that of their electors, put them upon the market?

The towns also obtained the railroads for which they subscribed these aids, and is it equitable, or lawful, that they should retain the fruits of, and yet repudiate their contracts?

Quoting from this Court in a former decision—"In Sedgwick on statutory and constitutional law, it is said—it must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract arising either on a question of regularity of organization or of power conferred by the charter, *a party who has had the benefit of the agreement* cannot be permitted in an action founded on it *to question its validity*. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

Township of Pine Grove v. *Talcott*, 19 Wall. 678.

It was a question of "power to contract" in these cases. If this act of the Legislature was unconstitutional, then these towns had no power to contract, because the law was void and conferred no power to act under it.

Just so in the Pine Grove case quoted from. It was a question whether the law of Michigan, under which the town sought to aid

a railroad, was *constitutional*, and this Court quoted the law from Sedgwick as applicable.

The record in this case discloses but one feature not in records of similar suits before this Court at its last term, viz: the attempt of the town to prove that an actual majority of the voters of the town did not participate in the special election. But this precise point was made and overruled in *St. Joseph* v. *Rogers*, upon a large array of authorities.

16 Wall. p. 664.

To the authorities there cited in the note, may be added the case of

Melvin v. *Lisenby*, 72 Ill., 63.

We can add nothing to the answer to this objection by the Court in the Rogers case (p. 664). The law and decisions *mean*, a majority of those voting at the special election, not a majority of the legal voters residing in the town at the election.

The law presumes defendant in error to be a purchaser before due, for value, without notice.

Bank of Metropolis v. *New England Bank*, 1 How. 239.

Chambers County v. *Clews*, 21 Wall. 323.

Carpenter v. *Longan*, 16 Wall. 273.

Hence the recitals in the bonds as to the vote, and compliance with the law, estop the town to gainsay their regularity, as this charter imposes the duty on the officers issuing the bonds to determine what their recitals declare.

16 Wall. 665.

In conclusion, we submit to the attention of the Court whether, under its decisions, the record in this case can be reviewed, there being no special findings, the evidence *at large* merely being brought here for *a review de novo*, as if this were a trial Court.

Miller v. *Life Ins. Co.*, 12 Wall. 300–3.

Insurance Co., v. *Folsom*, 18 Wall. 249.

Respectfully Submitted,

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